

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HQM OF SPENCER COUNTY, INC.

and

CASES 9–CA–41323
9–RC–17927

UNITED FOOD & COMMERCIAL WORKERS
UNION LOCAL 227, AFL-CIO-CLC

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for the General Counsel.
J. Chris Sanders, Esq., for the Charging Party Union.
Townsell G. Marshall, Esq. and *W. Jonathan Martin II,*
Esq., for the Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Louisville, Kentucky, on February 15, 16, and 17, 2005, pursuant to an Amended Complaint and Notice of Hearing that issued on December 30, 2004. The charge in 9-CA-41323 was filed by the United Food & Commercial Workers Union Local 227, AFL-CIO-CLC (the Union) on August 9, 2004.¹ The charge involves numerous alleged unfair labor practice violations of the National Labor Relations Act (the Act) that purportedly occurred between July 6, 2004, and early August 2004 in connection with the Union's organizing campaign involving the employees of HQM of Spencer County, Inc. (Respondent). Specifically, the amended complaint alleges that during the pertinent time period, Respondent terminated the employment of Billy Durham, Natalie Suffoletta-Smith, Ryan Orr, and Sandra Williams. The amended complaint also alleges 31 independent incidents in which Respondent is alleged to have engaged in conduct that interferes with, restrains, and coerces employees in the exercise of rights guaranteed by Section 7 of the Act and in violation of Section 8(a)(1) of the Act.

Case 9-RC-17927 involves a Board-conducted representation election on August 11, 2004, that was held pursuant to a stipulated election agreement approved by the Regional Director for Region 9 on July 13, 2004. The Tally of Ballots disclosed that 21 votes were cast

¹ All dates are 2004 unless otherwise indicated.

for the Union and 28 votes were cast against the Union. While there were no void ballots, there were six challenged ballots.² On August 16, 2004, the Union filed objections to the election. Following an investigation of the issues raised by the objections, the Regional Director for Region 9 of the Board issued a Report on Objections to Election, Recommendations to the Board, Order Directing Hearing, Order Consolidating Cases to the Board, and Notice of Hearing on January 25, 2005. In the Order, the Regional Director ordered that certain³ of the Union's objections be consolidated with the allegations contained in the amended complaint for hearing before an administrative law judge.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Counsel for the General Counsel, the Union, and Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, has been engaged in the business of providing residential nursing care at its facility in Taylorsville, Kentucky, where it annually derives gross revenues in excess of \$100,000 and purchases and receives at its Taylorsville, Kentucky facility goods valued in excess of \$50,000 directly from suppliers outside the Commonwealth of Kentucky. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Home Quality Management, herein HQM, is a health care management company that manages approximately 71 nursing homes throughout the United States. HQM's corporate officers are located in Palm Beach, Florida. HQM is owned and was founded by Elizabeth Fago. Joe Steier is HQM's president and chief operating officer and Linda Howe is Vice President of Human Resources. In 1999, HQM acquired the nursing home facility in Taylorsville, Kentucky, identified as HQM of Spencer County and known in the community as Valley View. Steier testified that the physical assets of Valley View, as well as other nursing home facilities owned by HQM, are not owned by HQM, but owned by publicly-traded Real Estate Investment Trusts, herein, REIT, which leases the property to HQM subject to certain contractual obligations. While each of HQM's nursing homes is set up as a separate limited liability corporation, HQM provides management assistance and direction from its Palm Beach, Florida corporate office. Respondent's Taylorsville facility is referenced herein as both Respondent and as Valley View.

At the time that the Union filed its June 30 election petition, Lisa Veteto was the

² The challenged ballots were not sufficient in number to affect the results of the election.

³ The Regional Director's Order specified that the consolidated hearing should dispose of the issues raised by Union's objections 1, 2, 3, 4, 5, 6, 8, 10 and the portion of objection 9 alleging the discharges of Billy Durham, Natalie Suffoletta-Smith, Ryan Orr, and Sandra Williams.

Administrator for Valley View. After Veteto's resignation on July 7, Stephanie Englebrecht was selected as the new administrator. Blake Bell functioned as interim administrator after Veteto's resignation and prior to Englebrecht's employment. Barbara Railley was Director of Nursing during the Union's campaign and relevant time period.

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B. The Union's Organizing

When union representative Alex Hernandez requested records from the Kentucky Nurses Registry in May 2004, he obtained 27,000 names of nurses throughout the Commonwealth of Kentucky. From that list, he began a telephone canvass of the nurse's assistants working at Valley View. Over the weekend of May 22, Hernandez spoke with a number of employees at the facility and obtained the names of other employees for contact. On Monday morning, May 23, Hernandez received a voice mail message from Respondent's Director of Nursing, Barbara Railley. While she inquired why he was calling individuals who worked at the facility, he did not return her call.

The following day, Hernandez met with employees Glenna Hilbert and Vickie Curtsinger. Both employees worked as nursing assistants and were long-term employees of Respondent. Accompanied by Curtsinger and Hilbert, Hernandez began making house calls to employees and distributing union authorization cards. Hernandez testified that throughout the month of June, he met with employees throughout the day at the Dairy Queen adjacent to Respondent's facility. He recalled that he had meetings at 7:00 a.m., 2:00 p.m., and 5:00 p.m. in order to see employees who worked different shifts. The Dairy Queen became the location where he regularly met⁴ with employees and distributed union literature.

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On June 30, the Union filed its petition to represent certain employees⁵ at Respondent's Taylorsville, Kentucky facility. On that same day, Hernandez telephoned several of the employees and asked that they meet at the Dairy Queen during their breaks that day. Hernandez recalled that employees Anna Burden, Uley Washburn, Aliecia Allison, Amanda Wilmoth, Glenna Hilbert, Ryan Orr, Brenda Keeling, Sandy Williams, Debra Crowe, and Kristina Hughes met with him at the Dairy Queen.

Former administrator Veteto testified that she first became aware of the Union's organizing campaign in May while she was home on maternity leave. In a telephone conversation, Director of Nursing Railley reported that a nursing assistant had complained about receiving a call from a union representative. Railley also reported that she had heard that Glenna Hilbert and Vickie Curtsinger were working with the Union and its organizing campaign. Veteto reported the Union's organizing to HQM's president of operations as well as to corporate legal counsel.

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Veteto also received a telephone call at home from Unit Manager Mary Jane James reporting that employees were meeting at the Dairy Queen and that employees supporting

⁴ Hernandez recalled that he also had "a couple" of meetings at the Fish & Game Club of Taylorsville that is located approximately three-quarters of a mile from Respondent's facility.

⁵ The Union petitioned to represent "All full-time and regular part-time CNA's, CMT's, restorative aids, dietary employees, housekeeping employees, laundry employees, activities assistants, and maintenance employees, excluding all RN's, LPN's, office clerical employees, employees employed by temporary agencies and professional employees, guards and supervisors as defined in the Act."

the union had enough signatures to file a petition. After receiving the telephone call, Veteto drove through the Dairy Queen parking lot to see if there were any employees meeting there. She testified that she didn't recall seeing any employees there at that time. Veteto testified that because of the proximity, she went to the Dairy Queen for food during the course of the Union campaign. She didn't recall any other occasions when she specifically went to the Dairy Queen for the purpose of looking for employees.

Glenna Hilbert testified that she and other employees met with Hernandez at the Dairy Queen on June 30. Hernandez told the employees that the petition for election had been filed that day. She recalled that the meeting might have lasted for as long as an hour and a half. The following workday Veteto called an employee meeting at 8:30 a.m. Veteto read and distributed a document from the corporate office. The document referenced employee rights and discussed the merits of signing union authorization cards. The document was received into evidence and its contents are not alleged in the complaint as violative of the Act. Hilbert testified that during the meeting, Veteto told employees that she knew who attended the meeting with the Union the previous night. She told employees that those who attended "had better have clocked out for supper." Hilbert also testified that Veteto told employees that she knew who had signed union authorization cards.

While employee Anna Burden placed the date in July, she also recalled that she attended a meeting held outside the Dairy Queen. During the meeting that was held between 8:30 p.m. and 9:00 p.m., she saw Veteto drive past as she and other employees were sitting at an outside picnic table. Burden recalled that while Veteto did not stop or say anything to the employees, she looked toward them. Veteto held a meeting with employees the following day. Burden testified that Veteto told the employees that if anyone had been at the Dairy Queen without clocking out, they "were going to be in trouble."

Joann Brown attended a meeting with the Union that was held at the Fish & Game Club and a second meeting at the Dairy Queen. She recalled that when she attended the meeting at the Dairy Queen, she observed Veteto's car pass by the building. She did not identify the date of this meeting. Brown testified that during a meeting occurring after her attendance at the two meetings, Veteto told employees that Respondent knew that employees were meeting with union representatives. Brown testified that Veteto also told employees that if the Union were elected, Respondent could close the facility.⁶ Brown denied, however, that there was any mention of the Dairy Queen in this meeting. While she testified that this meeting occurred at approximately eleven o'clock, she did not identify the date of the meeting.

Uley Washburn recalled attending a meeting at the Dairy Queen in early June. While he and other employees were sitting at a table outside the Dairy Queen, he observed Veteto on the road in front of the Dairy Queen. She did not, however, drive into the Dairy Queen parking lot. Washburn testified that she appeared to be looking at the employees.

Veteto acknowledged a meeting with employees when she told them that she was aware that employees had held a meeting and had left the facility while "on the clock." Veteto testified that she told employees that it was a policy that they must clock out if they

⁶ This statement is not alleged as a violation in the complaint and is not corroborated by any other employee.

left the facility.

Rhonda Dempsey was employed as the MDS coordinator at Respondent's facility from October 2001 until November 10, 2004. As MDS coordinator, she was responsible for resident assessments for Medicaid and Medicare reimbursement. Dempsey is a registered nurse and was considered to be a member of management. She recalled that she first learned of the Union's organizing campaign during a management conference call with President Joe Steier during the last week of June. Dempsey recalled that Barbara Railley, Tracy Hardy, Lola Goodwin,⁷ Lisa Veteto, and Suzette Durham⁸ were present during Steier's conference call. Veteto recalled that all of the management staff was present, including the managers for Dietary, Housekeeping, Laundry, Human Resources, Staff Development, the Business Office, as well as the Director of Nursing. Steier began the call by asking Veteto why she had not known about the union organizing and the meetings at the Dairy Queen. Steier also questioned Human Resources Manager Suzette Durham and Director of Nursing Railley as to why they had not known about the union organizing and why employees felt that they needed a union. Suzette Durham recalled that Steier mentioned that were unions at a "couple" of facilities and one of the facilities was trying to get rid of the union. He mentioned that there had been a "rough time" getting rid of the Union and a lot of trouble. He added that Elizabeth Fago did not want to go through that again with the Taylorsville facility. Steier told Veteto that she needed to begin distributing information about the union and to begin talking with employees. Durham recalled that Steier explained that he would send a team to deal with the issues and the organizational campaign. Dempsey also recalled that Steier said that he was sending Blake Bell to the facility and described Bell as a "union buster." Veteto also recalled that Steier told the managers that he was sending Human Resources Vice-President Linda Howe and Blake Bell to the facility to help the staff. Veteto also testified that Steier referred to Bell as a "union buster."

On the weekend prior to July 4, Hernandez distributed to employees a sticker displaying the U.S. flag and the slogan "Union Yes." He suggested that it would be a good idea for employees to wear the stickers when they went into work to pick up their checks on Friday, July 2. Hernandez distributed approximately 15 of the stickers. Hilbert testified that she was one of the employees who wore the union insignia when she went in to pick up her check on July 2. Approximately 15 employees wore the union sticker when they went into the facility to pick up their checks. While Veteto was present in the area where the checks were distributed, she did not say anything to Hilbert about the union sticker.

C. Blake Bell and Linda Howe Arrive at the Facility

Bell testified that based upon his conversations with Steier, he began working for HQM as a Director of Special Projects in June 2004. He acknowledged, however, that he was not an employee and that he was paid weekly as a consultant. Bell denied that there was any written document that specified his duties as a consultant or what he was expected to do for monetary remuneration. Bell confirmed that Steier told him that a union petition had been filed at the Taylorsville facility and asked him to go there. Upon arriving at the facility on July 6, Bell met with the management staff. He explained that because a union petition had been filed, he met with the management staff to assess the facility from the management

⁷ Goodwin was identified as supervisor over the Dietary Department.

⁸ Suzette Durham was Human Resources Manager at the time of the conference call.

standpoint. He stated that he also wanted to assess issues relating to the clinical, operational, and financial status of the facility. Linda Howe testified that she went to Valley View on July 5 because a union petition had been filed. The record reflects that both Howe and Bell remained at the facility until the union election on August 11.

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Veteto recalled a management meeting with Bell and Howe on either the first or second day after their arrival at the facility. The management staff reviewed a list of employees and discussed which employees were thought to be supporters of the Union. Veteto recalled that employees Glenna Hilbert, Vickie Curtsinger, and Billy Durham were identified as Union supporters.

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Bell recalled that he met with the employees on the 3:00 p.m. to 11:00 p.m. shift on July 6. The following morning, he met with employees on the 11:00 p.m. to 7:00 a.m. shift and the following afternoon he met with all of the employees at the facility. Bell asserted that when he spoke with employees he told them that he was not at the facility because of the Union, but to address patient needs and quality care. Bell testified that he “asked for input” from the employees about the issues related to the facility. He recalled that the employee responses were numerous and that employees brought up a variety of concerns including insufficient supplies, inadequate support from nurses, and insurance benefits.

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Various employees testified concerning the meetings conducted by Bell and Howe. Anna Burden recalled that Bell and Howe told employees that they were there to “get things straightened up” and asked employees to tell their issues and problems. Dana Palmer recalled that Bell asked employees what he could do to help them and asked their problems. Aliecia Allison testified that Bell and Howe told employees that they were there because things were “not going as they should” and they asked about employees’ complaints.

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LPN Natalie Suffoletta-Smith attended Bell’s meeting with second shift employees on July 6. She recalled that Bell and Howe questioned why the employees were unhappy. At the time of the meeting, she had approximately \$9,000 of unpaid medical bills and she had experienced problems with the insurance program. She told Bell and Howe about her difficulties in resolving the problems and her frustration with corporate office not returning her calls. Suffoletta-Smith recalled that Bell and Howe promised to reimburse her for her calls to the corporate office in Florida and promised that her insurance claims would be resolved.

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In response to Bell and Howe’s inquiries, employees shared their concerns about staffing, inadequate supplies, compensation, equipment problems, insurance problems, and difficulties communicating with management.⁹ Suffoletta-Smith recalled that Bell and Howe promised to improve conditions. Vickie Curtsinger testified that in the meeting in which Bell and Howe introduced themselves to employees, Howe stated that they were there to get rid of the troublemakers. No other employees corroborated this testimony.¹⁰

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Aliecia Allison recalled that Bell and Howe told employees that they were sorry that they had not known about the employees’ issues and they promised that they would do

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⁹ See testimony of employees Carmen Graham, Brenda Faye Keeling, Anna Burden, Dana Palmer, and Aliecia Allison.

¹⁰ While Counsel for the General Counsel stated that Billy Durham’s testimony was also offered in support of complaint paragraph 8(a), Durham did not corroborate Curtsinger.

everything in their power to correct the problems. Joann Brown recalled that Bell and Howe told employees that if they had issues they should talk with them instead of getting the Union involved. Suffoletta-Smith recalled that Bell told employees that if he had a problem with his wife, he would talk directly with her and not take the problem to a "hardware store."

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Billy Durham attended the meeting on July 7 conducted by Howe and Bell. He recalled that about fifty employees were present from first and second shifts. Howe had been to the facility previously and consequently she introduced Bell to the employees. Durham testified that Bell began by saying: "I'm sure you probably know why we're here, we're here because of the Union." No one said anything in response. Bell then stated that he was surprised that no one knew about the union because he and his wife always talk about their job. Bell told employees that he wanted feedback on issues and problems at the facility. He told employees that he was there to take care of the issues and to solve the problems.

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Durham responded: "Well, Mr. Bell, I feel like we don't know what to believe. We've been promised things before; it has never, you know fallen through." Durham told Bell that the employees had taken their issues to the supervisors and to administration and nothing seemed to get resolved. Durham asked Bell what employees should believe because the issues brought to management never seem to be resolved. He told Bell that employees are told that management will take care of the situation and yet nothing is done. Bell responded that he would talk with Durham privately. Carmen Graham, Joann Brown,¹¹ and Dana Palmer recalled that Durham addressed concerns during the meeting. Suffoletta-Smith also recalled that during the July 7 meeting, Bell mentioned that it did not matter whether HQM had 70 or 71 nursing homes. She did not, however, explain the context of this alleged remark. Additionally, no other employee corroborated that Bell made this statement during the July 7 meeting. Joann Brown was asked on direct examination if there was any discussion during this meeting about what would happen "if the Union came in." She denied that there was any such discussion by Bell and Howe during this meeting.¹²

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D. Bell's Conversations with Employees Prior to Durham's Discharge

Carmen Graham spoke with Bell and Howe on Bell's second day at the facility. Bell initially approached her while she was in the restorative room where staff members were feeding patients. He told her that he met employees the previous evening and that her co-workers told him that she had been at the facility for a long time and that she knew what was "going on." He asked her to meet with him in the conference room. Initially there was only Bell and Graham in the conference. Shortly into the conversation, Howe joined them. Bell asked how things were going at the facility and Graham shared her concerns about inadequate supplies for employees. When Bell asked her opinion as to the worst nurse, she was unable to give him any names. Bell asked Graham "if it was too late to turn them around." When Graham inquired if he was talking about the Union, he confirmed that he was. Graham told him that he would have to ask the individual employees. Bell and Howe took notes as they spoke with her.

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¹¹ Brown recalled that Bell told Durham that he would talk with him later.

¹² While Counsel for the General Counsel also offered the testimony of Keeling in support of complaint paragraph 8(b), she did not allege that Howe threatened closure of the Taylorsville facility during the July 7 meeting.

E. Durham's Discharge

Respondent employed Billy Jo Durham for two separate periods. He first worked at Valley View as an Admissions Director from 1999 until his position was eliminated in 2001. Durham returned to work at Respondent's facility as a Certified Medical Technician (CMN) in May of 2002. As a CMN, Durham was licensed by the Commonwealth of Kentucky to administer medications and provide treatment. In July 2004, Durham's regular hours were from 6:45 a.m. to 3:15 p.m. and the Director of Nursing directly supervised him. At the time of his July 2004 discharge, Durham's wife was also employed by Respondent as a manager for Human Resources and Payroll. As discussed above, Suzette Durham participated in the June 30 conference call with Steier and other management staff. During the conference call, Steier specifically questioned Suzette Durham as to whether she had known about the union organizing and she denied that she had any prior knowledge.

Prior to Durham's discharge on July 8, 2004, Durham signed a union authorization card on May 29. He also recalled that when he was away from the facility, he spoke with other employees about the union. As discussed above, Durham was one of the employees who brought up various concerns during Bell and Howe's meeting on July 7. Durham also questioned Bell as to whether employees could believe that conditions would improve at the facility. Suzette Durham testified that on their drive home on July 7, Billy Durham told her about the meeting with Bell and Howe. He told her about speaking out in the meeting and opined that he would probably be fired before the end of the week.

As an REI educator for HQM, Christa Masden educates staff with respect to assessing residents and reimbursement. Masden testified that she was contacted by her supervisor in early July and told to go to Valley View. Masden recalled that she was told that there had been some serious clinical and systemic problems in the facility that needed attention. Upon arriving at the facility on July 7, she spoke with Bell and Howe. She recalled that she told them that it was her impression that employees were doing what they wanted at the facility without any leadership. When she returned to the facility the following morning, she began compliance rounds at approximately 6:00 a.m. She testified that prior to July 8, she had never seen Billy Durham. She recalled that on July 8, she observed Durham push his medicine cart "wildly" down the hall in front of the nurse's station. She stated that he parked the cart over to the side of the hall and walked away from it. Masden testified that after walking over to the cart, she closed and locked the cart and waited for him to return. When Durham returned to the cart, Masden told Durham that he had left his cart open and that doing so was not safe for the residents and not a good practice.

Durham testified that during his morning "med pass," he observed Masden walk toward his cart and push in the lock on the cart. At that time, she said nothing to him. Approximately 45 minutes later, she approached him and said: "You're doing a good job. You're very observant, You're very good at what you do, you know, just watch your cart, make sure it's locked." Durham recalled that he told her that he always watched his cart and he did not make a habit of leaving his cart unlocked without observing it. Durham testified that during the morning "med pass" he had been approximately four or five feet from his cart and it had been directly in his view while he was dispensing medicine.

Contrary to the testimony of Durham, Masden testified that she spoke with Durham about the open and unlocked cart when she first saw him. She testified that later in the

morning, she again observed Durham across the room with his back to his open cart. She closed and locked the cart and waited for his return. Marksmen testified that she told him that he could lose his license or certification for leaving the cart as he had. She reminded him that self-ambulatory patients had access to the cart.

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Masden asserts that after her second conversation with Durham, she talked with Bell and Howe and then prepared and issued a written warning to him. Durham recalled that Masden pulled him aside in the break room and gave him the written warning. After receiving the warning, he proceeded with his noon medications. At approximately 1:00 p.m., the Director of Nurses informed Durham that Bell wanted to see him in the conference room. Bell told Durham that his services were no longer needed. Bell gave Durham a copy of the written warning that he had signed earlier. Bell referenced policies and procedures and told him that this conduct is something that Respondent does not tolerate.

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Suzette Durham testified that her husband came to her office and told her that he had been terminated. Because it was more than 2 hours before he was scheduled to end his shift, he told his wife that he would wait for her at the Dairy Queen. Suzette Durham told him to wait and she would find out if she could leave early to take him home. She found Bell and told him that she needed to take her husband home. She suggested that she could either come back to work after taking him home or she could simply return the next day. Bell did not respond to her request and asked her to accompany him into the conference room. When she sat down, Howe joined them as well. Bell handed her a form confirming her termination. When she questioned why she was terminated, Bell told her that because the employees felt the way they did, it was apparent that she was not able to do her HR job. Bell went on to explain: "We feel that you could not do the HR position with the Union coming into the building." Howe told her that she would need to get her belongings and gave her two black garbage bags. Suzette Durham recalled that Mitch Abrams from the corporate office stood in her doorway as she packed her belongings in the bags. Abrams tied the bags and then took them outside the building and placed them on the curb.

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F. Howe's Restriction on Employees' Wearing Union Stickers

Glenna Hilbert first wore the Union sticker to work on July 2 when she went into pick up her paycheck. Nothing was said to her that day about wearing the sticker. Hilbert again wore the sticker when she returned to work from her vacation on July 10. Howe approached Hilbert and asked her to remove the sticker. Howe explained that while the sticker could be worn outside the building, it could not be worn inside the building. Hilbert removed the sticker and continued to work. She testified that prior to that date, she had seen other employees wearing various items on their uniforms. She recalled that employees have worn ribbons and pins in celebration of Halloween, Christmas, and Easter. Hilbert had worn angel pins on her own uniform. Hilbert was aware of no published policy prohibiting employees from wearing stickers, pins, or extraneous items on their uniforms. Former Administrator Veteto testified that she was unaware of any policy regarding wearing pins or other items on uniforms. She recalled that employees wore various types of items on their uniforms including Christmas pins and Easter pins as well as pins showing support for various universities. She was not aware that any employees had been required to remove these items from their uniforms.

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Complaint paragraph 7(i) alleges that about July 2004, Bell told a meeting of employees that they could not wear union buttons. No employees substantiated this

allegation.

G. Alleged Surveillance by Bell and Howe

5 On the same day that Howe required Hilbert to remove the Union sticker, Hilbert met with Alex Hernandez outside the Dairy Queen. Employee Uley Washburn and Union Organizer Paul Pappas were also present. While Hilbert was providing Hernandez a statement about the removal of the Union sticker, Hernandez asked her to describe Howe and Bell's physical appearance. Hernandez then pointed out two individuals who were sitting
10 in a car in the parking lot matching her description. Bell and Howe exited the car and walked into the Dairy Queen. As they passed by Hilbert and the others sitting outside, they stopped and introduced themselves.

H. Additional 8(a)(1) Allegations Involving Bell and Howe During July 2004

15 Sandra Williams testified that in early July, Bell and Howe came to the Dietary Department and spoke with employees. They asked about the problems that employees were experiencing and also asked what employees needed in the kitchen. Keeling was unaware of management ever previously coming to dietary to ask employees what they
20 needed. Both Williams and Keeling recalled that Keeling mentioned that they needed additional rags for cleaning. Shortly thereafter, Howe brought new rags for the employees in dietary. In another conversation that occurred later in July, Howe and Bell asked Williams what she felt the problems were in the Dietary Department. Williams told them about staffing problems and grocery shortages. Howe told Williams that they were there to "fix the
25 problems" and "to make it right." During the conversation, Howe told Williams that a union would divide the building. After Howe and Bell visited the Dietary Department, the dietary employees began getting the supplies and groceries that they needed.

30 Aliecia Allison recalled a time in late July or early August when she and fellow employee Loren Miller were talking about the Union. Allison presumed that Bell overheard their conversation as he asked them if they had any questions or wanted to talk with him. Allison and Miller agreed and went with him into the administrator's office. The employees asked Bell what would happen to the facility if the Union "came in." Allison testified:

35 He told us, from a business standpoint, if he was Elizabeth Fago and he had a facility that was losing money and it was trying to get a union in, would he close the doors or leave it open, which I kind of took as a threat that it would be closed down if the Union came in.

40 Allison also recalled that Bell told her that sometimes he thought that she was with him and other times he felt that he was losing her. Allison told him that she would not be sure how she would vote until she was in the polling area. She also recalled that at some point during the conversation, Bell stated that regardless of whether the Union came in or not, HQM would always be in charge of hiring and firing. Allison asked Bell if he and Howe
45 were going to remain at the facility after the union election or if they would be gone forever. Bell told them that he and Howe would still come back and check on the facility and make sure that everything was going okay. Allison testified that in a later conversation, Bell asked Amy Waldrige Kidwell and her if they were "on his bus."

I. Elizabeth Fago's Visit to the Facility

Complaint paragraph 5 of the amended consolidated complaint alleges that Elizabeth Fago threatened employees with closure of the facility and offered employees money for food and promised other benefits on July 12. Elizabeth Fago testified that she visited Valley View on July 12 for two reasons. She stated that she wanted to set the record straight on some Union handbills that had been distributed and she also wanted to address with employees any concerns about Veteto's former administration of the facility. Fago explained to employees that a newspaper article distributed by the Union was politically motivated and also included details that were not true. Fago recalled that she told employees that she was concerned that none of them had called her to let her know what was going on at the facility. She told the employees that they had access to her by telephone at any time. Fago gave the employees her cell phone number and Blackberry number and she asked that Bell and Howe to insure that her numbers were posted throughout the facility.

Fago recalled that she talked with employees about the financial status of the facility. She told them that the facility had lost approximately three million dollars over the last four years and she distributed a copy of the Statement of Operations reflecting a net loss of \$3,310,085.30. She testified that she reminded employees that the facility had previously done much better and that "they really needed to dig deep inside and pull this through and work as a team, as a family and get this property back to what it was." Fago recalled that she also talked with employees about what was needed at the facility. She recalled talking with employees about supplies and equipment needed in the kitchen area. While she acknowledged that she gave employees money during the meeting, she asserted that she always goes to facilities with a "nice wad of cash" to give to the staff for landscaping or pizza parties. She acknowledged that she gave employees money for a pizza party and told them that she would continue to give the money on a monthly basis as she does at several facilities.

Alice Grundy recalled that Fago came to the Dietary Department at approximately 10:00 a.m. on July 12 and spoke with her as well as Brenda Nation and Barbara Clark.¹³ She told the employees that there was to be a mandatory meeting for all the employees at 2:00 p.m. Fago told them that the people standing out on the road were not going to do any more for them. Grundy understood that she was talking about the Union. Fago slammed down her hand and told the employees that she would close the facility before she would "let those people get in." Grundy testified that Fago stated that she owned the facility and could close it anytime that she wanted to do so. Brenda Nation also recalled that Fago slapped her hand on the table and said: "Girls. if the Union comes in, I will close these doors." She added that it would not hurt her; it would hurt the employees.

At approximately 2:00 p.m., Fago met with employees on first and second shift. Fago testified that while Bell and Howe were present, she conducted the meeting and did most of the talking. Dana Palmer recalled that Fago began the meeting by telling employees that she was shocked that no one had contacted her to let her know how bad things had become at the facility. She blamed the problems on the former administrator. Wanda Dempsey testified that Fago seemed angry when she told employees that they should have called her

¹³ Nation recalled that Brenda Perkins and Mary Harden were also present in the kitchen during Fago's visit.

if they had complaints.

Palmer recalled Fago's asking employees if they felt that they were sufficiently paid. She also told them that if they received raises in the future and the Union was elected, their raises would be offset by the union dues. Brenda Nation recalled that Fago told them that the Union was just out to get their money when she talked about their having to pay union dues. Grundy recalled that Fago told employees that "the people standing out there" were not going to pay them any more money or get their jobs back. She talked about the facility losing money and also stated that she didn't want anyone coming in and telling her how to run the facility. Grundy recalled that Fago stated that the facility was not making money and it would not bother her if she closed it. Nation also recalled that Fago told employees that she did not want a union in the facility and that she would close the facility. She explained that if she had to close the facility, it would not hurt her because she had other facilities. Dempsey recalled that Fago told employees that the facility had not done anything but lose money and she would have already closed the facility if it had not been for her love for the employees working there. Dempsey testified that Fago told employees that she was not going to let anyone come in and tell her what to do. She told them that she would close the facility before she would let that happen.

Palmer testified that there had been a fourth of July party for the residents and the staff had to contribute their own money for the employee party. Fago told employees that in the future, she would send money for them to have parties for the residents. She opened her purse and gave money to employee Jennifer Downs and then designated Downs as director for the parties. Nation also recalled that she threw down approximately \$300 to \$500 on the table and said that they could have a pizza party or a staff/resident party or whatever they wanted to do with the money. Fago told them that she would send money every month for them to have a party. Nation confirmed that management had never previously provided money for such parties on a monthly basis. Grundy recalled that Fago asked in the meeting if there was anything else that the employees needed. Dempsey testified that Fago told employees that if they needed anything, they should let Bell know and he would get it for them. She handed out her cell phone number to employees during the meeting.

Fago denied that she told employees that she would not let anyone tell her what to do or that she would close the facility. Fago acknowledged that she "had a cigarette" with some of the employees and engaged in "light chatter." She recalled that she went into the kitchen and that some of the employees asked her for her business card. She denied that she slammed her hand on the table when talking with the employees in the kitchen. She recalled that while in the kitchen, she asked employees if they had any specific needs. Fago denied that she ever mentioned the Union in her general meeting with the employees.

J. The Discharge of Natalie Suffoletta-Smith

1. Suffoletta-Smith's Duties and Authority

Smith began working for Respondent as an LPN in 2001. As an LPN, she dispensed medication and provided treatment to the residents as well as monitored the activities of the Certified Nursing Assistants (CNA's). Her duties were different than the Unit Coordinators who had more responsibility. Suffoletta-Smith testified that Unit Coordinators checked doctors' orders and charting by the LPN's. She denied that she could hire, fire, evaluate, transfer, suspend, layoff, promote, or reward employees. She spent 75 percent of her time in

patient care and the remainder of the time charting or recording patient status.

She acknowledged that as an LPN, she could “write-up” a CNA. She explained, however, that the write-up went to the Director of Nursing who made the decision as to whether discipline would be administered to the employee. In the write-up, she made no recommendation as to whether discipline should be given.

2. Suffoletta-Smith’s Support for the Union

Suffoletta-Smith learned in late May that the Union was trying to organize the CNA’s. While the Union was not seeking to represent the LPN’s, she nevertheless supported the CNA’s organizing. She not only signed a union authorization card, but she also wore a union sticker on July 2 when she went into work to pick up her paycheck. She recalled that Rhonda Dempsey and Barbara Railley were present in the area where the checks were distributed. She remembered that CNA Carmen Graham commented on the sticker and pointed out that the Union was not seeking to represent the nurses. She explained to Graham that she knew that, however, she was wearing the sticker in support of the CNA’s.

Suffoletta-Smith attended the meetings held by Bell and Howe. She recalled that during the first meeting, she spoke up and talked about her problems with insurance. She also stated that her husband was in a union and that she understood about union benefits for employees. During the meeting, Bell mentioned a magazine article that discussed unions’ “beating up families and blowing up cars.” She recalled that she laughed and told Bell that such things occurred back in the time when Jimmy Hoffa was in the union.

3. The Circumstances Surrounding Suffoletta-Smith’s Discharge

On July 20, Suffoletta-Smith learned that Andy Keller from corporate office was in the facility to handle outstanding insurance claims. She signed up to speak with him and also called her husband to ask him to bring her medical bills file. Her husband arrived at the facility while she was at lunch. When her husband learned that she was at lunch, he asked one of the nurses to give the file to “Natalie Smith.” Bell was standing near the nursing desk and corrected her husband and clarified that her name was “Natalie Suffoletta.” She testified that her husband became angry, threw down the file, and walked out of the facility. Employee Angela Lisby found Suffoletta-Smith and reported what had occurred between Bell and her husband. A few minutes later, Bell brought the file to Suffoletta-Smith and she corrected him that her last name was Smith. He pointed out, however, that her payroll records reflected that her name was Suffoletta.

Later in the afternoon and at approximately 2:00 or 2:30 p.m., Suffoletta-Smith went into the office to talk with Keller about her insurance claims. While she was in the office, Bell came in. He apologized to Keller that he had not introduced her and he explained that her name was “Natalie.” He also told Keller that she had the potential to be a good nurse, however, they had gotten off on the wrong foot. After he left the room, Suffoletta-Smith recalled that she rolled her eyes and said: “He comes across as a used car salesman.” Suffoletta-Smith finished her review of her bills with Keller and returned to the nursing unit.

At approximately 5:30 p.m., she spoke again with Keller concerning some miscommunication on one of the bills. After doing so, she began to walk away. Bell approached her and asked: “A used car salesman, is that the best you can come up with?”

Suffoletta-Smith tried to explain to him that she was upset and that she wanted to return to work. When she began to walk away, he told her to come into the office or she would be written up. She estimated that it was less than a minute between the time that he told her to go into the office and when she did so. She walked into the office and Bell asked Howe to join them. Once the door was closed, he told her that she could not make comments like that about him to “corporate” and that she had a bad attitude. He also mentioned that the previous week, he had corrected her on not answering a resident’s call light. When she tried to explain to him about why she had not wanted to speak with him and about the situation with the call light, he cut her off and did not allow her to speak. He told her that she was no longer needed at the facility.

Suffoletta-Smith testified that she had not immediately responded to a call light the previous week because she and a nurse practitioner were trying to correct a potentially fatal mistake in a patient’s medication. She had not received any discipline for the incident and the incident had not been mentioned to her again prior to her termination.

Bell testified that Suffoletta-Smith was terminated for having a bad attitude, insubordination, and for not performing as a team member. Bell explained that when Keller asked Suffoletta-Smith on July 20 how she liked working with Bell, she responded that he was nothing but a used car salesman. After Keller reported the conversation to him, Bell went to Suffoletta-Smith and told her that he wanted to speak with her in the office. Bell testified that she walked away from him and did not respond to him at all. He asserted that he again asked her to join him in the office and she continued to walk away and ignore his request. Bell maintained that he told her that if she continued to ignore his request and walk away, he would consider it a refusal of a direct request of a supervisor and grounds for termination. Bell testified that at that point, she stopped and returned to the office with him. Bell described her attitude as similar to prior instances when she was “very distasteful,” “very negative” and “very immature.” He described her behavior as similar to teenage angst. When she came into the office, he confronted her about referring to him as a used car salesman. She did not deny having done so. Bell testified that he reminded Suffoletta-Smith about an incident occurring the prior week when he asked her to respond to a patient’s call light. Bell contends that during the previous incident, she initially “rolled her eyes” and refused to respond to the call light. When he asked a second time, she had done so. Bell testified that he had verbally counseled with her at that time about her attitude. Bell told Suffoletta-Smith on July 20 that he had reviewed her personnel file and found that she had previous discipline.¹⁴ Bell terminated her.

K. Ryan Orr’s Discharge

1. Orr’s Union Activity

Ryan Orr began working for Respondent as a certified nursing assistant in June 2004. During his employment, he supported the Union’s organizational activities. He testified that he attended union meetings¹⁵ and talked with other employees about the Union.

¹⁴ The prior discipline included a suspension on July 1, 2003 for “multiple med errors” and falling asleep on the job. She was suspended until her physician released her to return to work. She received a written warning on May 21, 2004 for engaging in a powder fight at the nurse’s station.

¹⁵ He signed a union authorization card on June 5.

He wore a union sticker on his shirt on the day after the filing of the union petition. He recalled that Lisa Veteto and Barbara Railley were at the facility on the day that he wore the sticker. When asked if he saw them that day, he initially said that he did not. He then clarified that he was not sure if he saw them, however, he did not interact with them that day. He testified that the only union meeting that he attended away from the facility¹⁶ was a meeting that was held at the Dairy Queen. He recalled that Glenna Hilbert, Amanda Wilmouth, and Union Representative Alex Hernandez were also at the meeting. The meeting occurred during the week before the filing of the union petition and lasted approximately 25 minutes.

2. The Circumstances Surrounding Orr's Discharge

Orr testified that on approximately July 6, a resident asked him to assist her in ambulating to the bathroom and he did so. He recalled that while he was assisting her, the resident asked him for pain medication. He told her that he could not give her the medication, however, he would let a nurse know that she needed medication. Orr testified that upon returning to the nurse's station, he informed a nurse that the resident requested a pain pill. The nurse told him that she would get to it when she could. Orr recalled that the resident continued to request the pain medication during his shift and when he later returned to her room. Again, he told her that he would let the nurse know. The following day, Orr learned that the resident complained about not getting the medication and also complained about his management of the situation.

On July 15, Bell asked Orr for a written statement as to what occurred with the resident who complained. In the statement,¹⁷ Orr stated that he responded to the resident's call light and assisted her in getting to and from the bathroom. During the process of taking her to the bathroom, the resident asked for pain medication. He included in the statement that when she returned to her bed, she again turned on her light and explained that the light was for the nurse to give her pain medication. Orr stated in his written report that he "calmly" tried to explain to her that she didn't need to turn on her light as he was "standing right there." Orr acknowledged: "... due to the circumstances, I can understand if my tone of voice did not sound pleasant. I did not want to offend her, but I apologize if I had done so." A few days after writing the statement, Orr was called to the conference room to meet with Bell and Howe. They reminded him that he was in his 90-day probation period and that he was fired for verbal abuse.

On cross-examination, Orr admitted that he had also received a written warning on July 17 for refusing to get a resident out of bed and for not turning a resident as per the schedule. The disciplinary consultation form reflected that Suffoletta-Smith signed the form as both a witness and as the supervisor. When Suffoletta-Smith testified, she did not specifically address Orr's warning. She did, however, testify that if a CNA failed to change a resident throughout an entire shift, she would consider the conduct to be neglect. She added that if she did not report patient abuse, she could lose her nursing license.

Linda Howe testified that patient abuse might be mental, physical, psychological, or sexual. Taking the possessions of a resident may also constitute patient abuse. Howe also

¹⁶ There was no record evidence of any union meetings that were held at Respondent's facility.

¹⁷ The statement was received into evidence as General Counsel Exhibit No. 20.

explained that speaking to a resident in a harsh tone might constitute patient abuse. On June 1, 2004, Ryan acknowledged receipt of Respondent's Policy For Adult Protection. The policy provides:

5 It is a policy of Valley View Healthcare Center that any employee of this facility who has reasonable cause to believe or even suspect that a resident has suffered abuse or neglect, which include rough physical treatment, abusive, or disrespectful language, or failure to respond to the needs of a resident, must report the incident immediately to their immediate supervisor, Administrator or Social Worker.

10 Reports may be made by anyone: family, visitors, or residents when the above occurs or is suspected. Names, addresses and/or phone numbers of agencies to contact, are posted in the front lobby, and side one entrance hall. Reporting of suspected abuse, neglect or exploitation is a responsibility of every employee. By signing below, you acknowledge this responsibility and agree to abide by this policy.

20 Respondent submitted into evidence a Resident Abuse report that was prepared and submitted to the Kentucky Regulatory Department. The form documents abuse by Orr on July 16 by failing to inform the nurse of the resident's need for pain medication. The report also states that upon Orr's return to the resident's room, Orr told the resident in a harsh tone to stop pushing her call light. The form also indicated that when Social Services interviewed the resident, the resident "had nothing negative to say about the employee." The form reflects that the incident of abuse was witnessed by another CNA.

30 Howe testified that generally employees are terminated when they commit an offense during their probationary period. Respondent introduced records¹⁸ to show that it has previously terminated other CNA's for similar conduct. On December 30, a CNA was terminated for her conduct toward a resident requesting to be turned.¹⁹ On April 5, 2004, a CNA was terminated for failing to attend to dirty sheets and for failure to give the showers assigned to residents during a scheduled shift. Orr was terminated on July 17 for being verbally abusive to a resident within his 90-day probationary period. Howe testified that in Orr's own written account of the incident, he acknowledged that he may have spoken to the resident in a rough voice and he apologized for doing so.

L. Joe Steier's Visit to Valley View

40 Steier testified that he first became aware of the union's organizing campaign at Valley View from Administrator Lisa Veteto. The same day he held a conference call with the department heads of the facility. Steier acknowledged that during the conference call he

45 ¹⁸ Respondent also offered records to show discipline at other facilities. Because the records did not involve past practice at Valley View, the records were not found to be relevant and were thus placed in the rejected exhibits.

¹⁹ The consultation forms reflects that when a resident asked the CNA to turn her, the CNA stated that she was getting ready to leave and was taking out the garbage. When the resident pushed her call light again, the CNA entered the room and stated "Let's flip this fat ass so she will stay off the light."

referred to Bell as a “union buster” in a comical way. Steier explained that he did so because Bell had previously taken over a facility late in a union’s campaign and the vote “came out miserable.” Steier contended that thereafter Bell’s being a “union buster” became a facetious joke. Steier also recalled that he mentioned the Dairy Queen during the conference call. He testified that the department heads told him in the conference call that they had not been aware of any union activity. Steier testified: “I think I made a comment that you know, after all the times, you know, at Dairy Queen, I’m surprised you haven’t heard anything being a department head and being a leader in the building.”

Steier made two visits to the facility during the Union’s organizing campaign. During the first visit in early August, he interviewed Stephanie Englebrecht for the position of new administrator. Bell had functioned as the acting director since Veteto’s resignation. Steier returned to the facility approximately a week or 10 days later and met with the employees in a group meeting.

Anna Burden testified that during the latter part of July 2004, a “Peer Council Committee” was formed at Valley View and she was designated as an employee member. Burden understood that the committee was formed to show that employees’ opinions mattered and to give employees a voice. Employee members of the committee were to sit in on interviews and to assist with the hiring process. On August 3, Burden attended a meeting of the committee along with Steier, Howe, Bell, Mary Jane James, and Dana Palmer.²⁰ Dana Palmer also recalled that Donna Nation and Ashley Owens were present for the committee meeting. They interviewed Stephanie Englebrecht for the position of administrator. As Burden and Palmer were leaving the meeting, Steier called them back into the conference room. Burden recalled that Steier asked them how they felt about the facility and asked her if she thought that things were going to get better. Burden told him that she did not know. Burden recalled that Steier stated that he wished to God that he had just 30 days to show them that he could turn the facility around. When Steier asked Burden how she thought that things were going, she replied, “Right now, I think 50/50.” Burden did not remember his response. She did recall that he asked her how she felt about the Union. She told him that prior to that day, she had been one hundred percent for the union, however, she was “no longer so sure.” Burden explained to him that since he was promising that he would “turn it around” and make things better, she was no longer sure of her earlier decision.

Burden recalled that during the meeting, Palmer asked Steier if he intended to close the meeting. Burden testified that Steier responded: “that wasn’t up to us.” Palmer recalled that she asked Steier what would happen if the Union were elected. He told her that it doesn’t really matter if HQM has 71 or 70 facilities.

Counsel for the General Counsel presented the testimony of nine witnesses to testify about Steier’s group meeting held on August 5. Brenda Nation testified:

Well, Joe was telling us that they didn’t want the Union in there, and that they would close the doors down, and he wouldn’t have to worry about it because he could go back to where he came from and kiss his kids and go fishing, but we would have to find us a job if they close the doors down.

²⁰ She recalled that there may have been two others present, however, she was not sure.

Burden recalled that Steier began the meeting by handing out booklets concerning the financial status of the facility and he explained how the facility was losing money. She further testified:

5 And he stated that he didn't care, you know, he could go back with 70 or 71 facilities, he could go back home, kiss his kids, go to church, go deep sea fishing, it wasn't any skin off his nose, it was up to us.

10 Dana Palmer also recalled that Steier distributed Respondent's financial statement and that he told employees that Respondent had lost money. When asked what she recalled of the meeting, she replied:

15 That it was brought up again about what would happen to Valley View. I don't know how it was said, but I remember him making the statement that it really didn't matter, that he was going back to Florida and kiss his wife and go deep-sea fishing, and pretty much it didn't matter, you know, to him, that it would affect us.

20 She recalled that he again mentioned that it did not matter if HQM owns 71 or 70 facilities. Brenda Keeling testified that Steier told employees that it wasn't anything to him if the facility closed. He told employees that he would go back to Florida, get his boat, and go fishing. Alice Grundy recalled that Steier told employees that he can go home, kiss his kids, go fishing and when he got up the next morning he would have a job. Dempsey also recalled that Steier mentioned that it didn't matter to him if HQM had 70 or 71 facilities.

25 A number of employees also testified that Steier talked about giving a copy of the financial statement to the Union. Keeling recalled that Steier asked if there were any people for the Union who could take one of the booklets out to the Union representatives. Bell spoke up and stated that employee Sandy Williams could take it to the Union. Alice Grundy
30 also recalled that Bell suggested that Sandy Williams take the statement to the Union. Uley Washburn recalled that Steier asked for a show of hands for those who supported the Union and also asked that someone take the financial statement to the Union. Washburn testified that Bell specifically asked Sandy Williams if she would do so because he knew that she was a friend of the people out with the Union. Dana Palmer recalled that Steier mentioned that
35 he wanted the Union picketers to see the financial statement and he asked if anyone would take it out to them. She recalled that he gave it to someone but she did not recall to whom he had given it. Anna Burden testified that after Steier asked for someone to take the statement to the Union, he looked directly at Sandy Williams and said: "You're union, will you?" Burden recalled that Brenda Nation volunteered to do it. Rhonda Dempsey also
40 recalled that Nation volunteered to do so. Although Nation testified concerning Steier's meeting, she did not confirm that she volunteered to take the statement to the Union or that Sandy Williams was asked to take it to the Union. Sandy Williams testified that Steier told employees that he would like for the Union to have a copy of the financial report. She recalled that he raised his hand and asked who supported the Union. Williams did not see
45 anyone raise their hands. She recalled that Bell suggested that she take a copy of the report out to the Union. Williams testified that she did not respond.

Steier confirmed that when he met with employees as a group on August 5, he distributed copies of Valley View's Financial Performance. He explained that during the meeting with employees, he discussed business facts because there were a number of

rumors related Valley View. Steier explained that Respondent did not own the facility and that Respondent was in default with most of the lease provisions. Steier explained in his testimony that by being in default, the bank had the right to close the building if it saw fit to do so. He testified that there were a "lot of rumors" that Respondent owned the physical plant and he wanted to talk with the staff about the people who had been in place in 2002 "during a good run of the building." He told employees that Respondent was still hopeful that with some good local leadership, things could be improved. Steier testified that wanted to make every employee feel that there were open records and that Respondent was trying to bring the honest facts so that everyone could make a decision.

Steier was asked on direct examination if Bell pointed out a specific employee and asked the employee to take a copy of the report to the Union. Steier responded: "When the, when the ah, when the meeting ended, a lot of people came up to ask questions and, and I'm not, I wasn't in town that long that day ---."

Steier denied that he told employees that Fago owned other facilities and it didn't matter if Valley View closed. He acknowledged that he did, however, talk with employees about the potential of what would happen with Valley View under a lease default and the potential for reduction of size based upon the existing Real Estate Investment Trust that owned the property. Steier explained that during the meeting, he wanted the employees to look at the facts, eliminate the rumors, and to decide what was best for the community. Steier testified that he wanted to convey to employees in the meeting that in order to maintain the facility in its current form, it was going to take a commitment from them to support the local leader as well as the bank's waiving a number of the lease defaults. Steier testified that Respondent repeatedly told the staff that Respondent did not know the outcome with respect to the REIT and the facility. He acknowledged that he told employees that it was very important for them to read the facts, come together as a group, and decide how they all wanted to do business. He also acknowledged that he told employees that he was going back to Florida and it was not going to affect HQM materially. He told employees that he was not going to guarantee anything about the continuation of the facility because Respondent was not in compliance with the lease. Steier testified that any request for employees to raise their hands was to determine those employees who had been at the facility in 2002 when the facility had a better reputation.

M. The Introduction of Stephanie Englebrecht

Steier introduced Stephanie Englebrecht as the new administrator during his August 5 meeting with employees. Alice Grundy testified that when Steier introduced Englebrecht, he told employees that she had previously closed four nursing homes. Steier also stated that if things did not turn around at Valley View and if the Union were elected, she could close Valley View and she would still have a job with HQM. Grundy also recalled that when Englebrecht spoke, she also confirmed that she had closed four nursing homes and that she would close Valley View if things did not turn around. Grundy also recalled that Englebrecht stated that as long as she still had a job at HQM, it would not bother her at all to close the facility. Brenda Nation testified that when Englebrecht spoke with employees, she told them that she had worked with HQM for several years and had closed a few facilities. She stated that she would close Valley View if the Union were elected and that she wouldn't have to worry about her job, because she would always have a job with HQM. Anna Burden also recalled Steier's introduction of Englebrecht. Burden recalled that in the introduction, Steier mentioned that Englebrecht had closed six other facilities and had not lost any residents

during the closings. Englebrecht also mentioned her closure of six other facilities and the fact that she had not lost any residents during the closings. Sandy Williams also recalled that Steier told employees that Englebrecht was "really good at closing facilities without any debt."

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Steier testified that Respondent told Englebrecht that even if the bank canceled the lease for Valley View, she would still have a career with the company. He acknowledged that during the meeting he told employees about her performance at other facilities and how she successfully closed a facility. He explained that he covered her whole career extensively and also talked about HQM's commitment to her. He told employees that with not knowing what was going to happen at the Valley View facility, Respondent wanted to make sure that it could use her talent in other ways with HQM.

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Englebrecht testified that the focus of the August 5 meeting with employees was the financial situation of Valley View. She also acknowledged that during the meeting she talked about her previous experience in closing nursing care facilities. She recalled that while the discussion was focused on her new role as administrator, there was reference to her having other opportunities with HQM.

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N. Sandy Williams' Discharge

Sandy Williams was employed by Respondent from December 31, 2002 to August 7, 2004. Williams was a dietary aid and worked under Dietary Manager Lola Goodwin. Williams signed a union authorization card on June 10, 2004. Prior to her discharge, Williams attended union meetings and took union flyers into the facility. She testified that she put a copy of the Union's Constitution in the break room, however, she did not recall the date that she did so. Williams also wore the Union's sticker to work on July 2 when she went to the facility to pick up her paycheck. She testified that she was "almost sure" that Goodwin saw the sticker on July 2. Williams recalled that when Steier visited the facility on August 3, he visited the Dietary Department along with Bell, Howe, and Englebrecht. During the tour of the kitchen, Steier told Williams that she really needed to tell Billy Durham that the shirt that he was wearing in a picture on one of the Union handbills "really makes him look bad." The handbill, received into evidence as General Counsel Exhibit No. 7, includes the picture of Durham and identifies him as an "Illegally-fired Valley View Worker & Organizing Committee Member." While the handbill is not dated, the handbill urges employees to vote in the August 11 election. Steier also remarked about the picture of Bell in the Union's handbills. Williams recalled that while Peggy Waldrige was working in the Dietary Department at the time, she was not working close enough to overhear Steier's comment. Williams testified that she did not say anything in response to his remark.

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The previous day Williams had stopped on her way into work to talk with the Union's handbillers outside the facility. Williams recalled that Howe had been outside the facility talking on her cell phone at the same time that she stopped to talk with the handbillers. On cross-examination, Williams admitted that she stated in her sworn affidavit to the Board Agent, that she had not seen Howe look over at her while she was talking with the Union handbillers.

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Shortly after Williams reported to work on August 7, Howe came into the Dietary Department. Williams acknowledged that when Howe spoke to her, she did not answer Howe. Williams recalled that Howe again said "Hello Sandy" and she did not respond.

When Howe asked her what was wrong, Williams did not respond. Williams recalled that Howe told her that she really needed to say hello and Williams then responded. Williams testified that one of the reasons that she was upset was Bell's "disrespecting" her in the August 5 meeting. Howe asked Williams if she (Howe) were Bell. Williams admitted that Howe was not Bell, however, she added that Howe was with him. Howe told Williams that she was very rude and disrespectful by not saying hello. Howe told her that she would need to come to the office to talk with her further.

Williams testified that at approximately 6:15 p.m., Howe called Williams to the office. Both Bell and Howe were present. Howe told Williams that she had been disrespectful and that she was terminated. Bell stated that Respondent could not have someone working there who was rude, disrespectful, and who had a bad attitude. Williams responded that they were firing her because they knew that she was for the Union. Williams recalled that Bell replied that he knew that she was for the Union but that had nothing to do with her discharge. She was given her termination paperwork and she left the facility. Williams acknowledged that approximately a year before her discharge, she received a written warning.²¹

Howe testified that she had spoken with Williams on a few occasions prior to her discharge concerning supplies and resident care. Howe recalled that on August 7, she had actually been working in the kitchen since 7:00 a.m. When Williams came into the kitchen, Howe spoke with Williams and asked how she was doing. Howe recalled that she spoke several times to Williams and Williams only stared at her in response. Howe recalled that when she asked Williams why she couldn't speak to her, Williams responded: "I don't have to fucking talk to you." Howe told Williams that she wanted to see her in the administrator's office in a few minutes. Howe testified that Williams was discharged for insubordination.

III. Analysis and Conclusions

A. Alleged 8(a)(1) Violations

1. Allegations of Surveillance

Complaint paragraph sections 7(g), 8(f), and 10(a) allege that Bell, Howe, and Veteto engaged in surveillance. Paragraph 10(b) alleges that Veteto confirmed her surveillance to employees. All incidents of surveillance were alleged to have occurred at the Dairy Queen, one of the two main restaurants in Taylorsville and the restaurant closest to the facility. Veteto testified that Valley View is located directly behind the Dairy Queen. The record is undisputed that employees and management of Valley View go to the Dairy Queen to eat and to take their breaks. Union Representative Hernandez testified that he chose the Dairy Queen as a place to meet with employees because it appeared to be the place where employees picked up food and coffee and took their breaks. He testified "it's so close to the facility, that's pretty much where they - - where they hang out, the workers, the employees of Valley View."

²¹ The warning, dated April 29, 2003, documents a written warning for improper conduct with a co-worker and assistant manager. Howe testified that the prior warning involved two co-workers who complained because Williams was rude, refused to work with co-workers, and had a habit of throwing utensils when she was angry. The individuals were not identified and there was no record evidence presented to support Howe's explanation of the prior warning.

As the Board noted in an early decision, not all surveillance is prohibited by the Act. Rather, it is the type of surveillance that interferes with, restrains, or coerces union activities that is prohibited. *Crowley, Milner and Co.*, 216 NLRB 443, 444-445 (1975). I further note that an employer's mere observation of open public union activity on or near its property does not constitute unlawful surveillance. *Villa Maria Nursing and Rehabilitation*, 335 NLRB 1345, 1350 (2001); *Emenee Accessories*, 267 NLRB 1344, 1344 (1983). The Board affirmed the administrative law judge's decision in *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972) wherein the judge noted that if a union wishes to organize in public it cannot demand that management must hide.

There is no dispute that Howe and Bell visited the Dairy Queen on July 10 while some of the employees were sitting outside talking with the union representative. There is also no dispute that the Dairy Queen was located adjacent to Valley View and was frequented by employees. Just because the union chose that location as a place to contact employees and to meet with employees does not prohibit management or anyone else from patronizing the business. There was no assertion that Howe and Bell repeatedly visited the Dairy Queen during union gatherings that occurred over the course of the campaign. There is no assertion that they lingered in their car or inside the Dairy Queen for an inordinate period of time on July 10. They simply visited the business at a time when Hernandez was talking with employees. There is no evidence that Howe and Bell went to the Dairy Queen at that particular time for the sole purpose of surveillance of employees' union activity. Overall, I do not find that Howe and Bell engaged in surveillance of employees' union activities as alleged in complaint paragraphs 7(g) and 8(f).

By contrast to the record evidence relating to Howe and Bell, Veteto testified that she went to the Dairy Queen on June 30 because she had heard that employees were meeting there and she had been told that there was enough union support for the filing of a union petition. She denied that she saw any employees there at the time. Employees Burden, Brown, and Washburn testified that they observed Veteto's car near the Dairy Queen. Veteto also admitted that in a meeting with employees the next day, she told them that she was aware that they had a meeting and she was aware that employees left the facility while "on the clock." She cautioned employees about the policy that they were to clock out before leaving the facility.

Respondent argues that Veteto's testimony as to the alleged surveillance on June 30, 2004 should be credited not only because she admitted to her failed attempts to observe the Union's activities, but also because she is no longer employed by Respondent. Counsel for Respondent argues that since Veteto was forced to resign from HQM, she has no motive to falsely testify. I credit her testimony that she went to the Dairy Queen on June 30 for the purpose of determining whether employees were meeting. I also credit her testimony that she talked with employees the next day about their having attended the meeting. Consequently, the record evidence supports a finding that Veteto engaged in surveillance on June 30 and confirmed her surveillance to employees on July 1, 2004. Complaint paragraph 10(b) also alleges that in addition to confirming her surveillance of employees' union activities, Veteto also threatened unspecified reprisals. Based upon Veteto's own testimony, it is apparent that her reference to the policy about clocking out when away from the facility constituted a threat of unspecified reprisal for employees engaging in such activity. Accordingly, merit is found to complaint paragraphs 10(a) and (b).

2. Alleged Solicitation of Grievances and Promises to Remedy Grievances

In *Uraco, Inc.*, 216 NLRB 1 (1974), the Board explained that it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances that is unlawful. The solicitation of grievances merely raises an inference that the employer is making such a promise. When an employer undertakes to solicit employee grievances during an organizational campaign, there is a “compelling inference,” that the employer is implicitly promising to correct the grievances and thereby influence employees to vote against union representation. *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6th Cir. 1972). Citing its earlier decision in *Reliance Electric Co.*, the Board more recently found that when an employer undertakes the soliciting of grievances only after a union has begun to organize its employees, the Board might draw an inference that the employer is promising benefits in an effort to persuade its employees that they do not need a union. *MacDonald Machinery Co. Inc.*, 335 NLRB 319, 320 (2001).

There is no dispute that Both Howe and Bell went to Valley View on July 6 after Steier learned of the Union’s petition. Almost immediately upon their arrival, Bell and Howe began meeting with employees individually and in groups. Bell admitted that in response to his requests for employee input, employees brought up their concerns about working with insufficient supplies, inadequate support from nurses, and insurance benefits. Bell testified that he asked for input from the employees about issues related to the facility. He testified that there were a number of issues about not having adequate supplies to use for patient care. Rather than pericare wipes, employees were forced to use pillowcases and brown paper towels. Employees told him about having a shortage of sheets and pads. He recalled that employees complained that the prior administrator prevented them from ordering necessary supplies. Numerous employees testified that Bell and Howe told employees that they were there to correct problems that had developed in the facility. Employees Palmer and Allison credibly testified that Howe and Bell asked employees about their problems and complaints. Suffoletta-Smith testified without contradiction that she brought up problems with the insurance carrier during Bell’s meeting with employees. Additionally, the record also reflects that Respondent brought in some one from the corporate office on July 20 to meet with employees about their individual insurance problems or questions. Fago testified that when she visited the facility on July 12, she went into the Dietary Department and asked employees if they had any specific needs.

Respondent does not deny that Bell and Howe asked employees for information about problems at the facility. Respondent asserts, however, that such requests were not solicitation of grievances because they “were designed to address patient care.” Respondent argues that the only changes made were directly attributable to patient care. I do not find merit to Respondent’s argument.

Sandy Williams testified that after Dietary employees complained that they did not have enough “rags” for cleaning, Howe provided new white rags for the Dietary employees. Williams also testified that Dietary employees told Howe about having inadequate groceries and also about the Dietary Manager’s failure to cover for employee shortages in the department. Williams testified without contradiction that after reporting these problems to Howe, Dietary employees had the food and supplies they needed to serve patient meals. Williams also testified that the Dietary Manager came in to work more often when employees did not show for work or called in absent.

Certainly, while the problems reported by employees impacted upon patient care, they were, nonetheless related to employee working conditions. By remedying these concerns, Respondent not only improved its service to patients, but also improved working conditions for its employees. Respondent does not cite any cases nor do I find any cases in which the Board has found inadequate supplies and equipment distinguishable from other working conditions. Based upon the record as a whole, it is apparent that employees would reasonably believe that Howe, Bell, and Fago were impliedly promising to remedy employee concerns in an effort to defeat the Union's organizational campaign. See *Health Management Inc.*, 326 NLRB 801, 801 (1998). Accordingly, I find that Bell, Howe, and Fago solicited grievances in violation of Section 8(a)(1) of the Act. Thus, merit is found to complaint paragraph sections 5(d), 7(a), (c), (f), (j), (k), and 8(c). I also find merit to complaint paragraph 7(b) that alleges that about July 6, Bell promised to pay employees' insurance-related telephone expenses, to pay insurance claims, and to seek better insurance benefits. Employee Aliecia Allison recalled that Suffoletta-Smith brought up problems with her insurance during the July 6 meeting with Bell and Howe. She recalled that Bell and Howe told employees that they were sorry and had not been aware of the existing issues and they told employees that they would do everything in their power "to fix it." Suffoletta-Smith testified that during this same meeting, Bell and Howe promised to pay employees' phone bills related to the insurance claims and promised that the insurance claims would be resolved. Neither Howe nor Bell specifically denied these promises. Accordingly, I also find merit to complaint paragraph 7(b). I find no merit, however, to complaint paragraph 7(o) as no evidence was submitted in support of this allegation.²²

Complaint paragraph 5(b) alleges that about July 12, Fago offered employees money for food and promised other benefits in order to discourage union activities. Fago testified that during her meeting with employees on July 12, she handed out approximately \$300 to employees for a pizza party for the employees and residents. Fago testified that she always goes to facilities with a "nice wad of cash" to give out to employees for landscaping or pizza parties. Fago also acknowledged that she told employees that they should have the pizza parties on a "continual basis" and she left instructions for Bell and Howe to carry through on her directive. Fago testified:

And I left instructions with Linda and Blake and I would probably have to tell you, do I physically know if they did it? I gave directions to do it, and as Chairman and Founder, I would assume that it was done. But I can't tell you that it came from my pocket again.

But since, I guess all, I own the Company, so I guess it would come from my pocket. But you know, I gave directions. It goes to petty cash. And you know, hopefully they followed through on my wishes.

Brenda Nation testified that Fago told employees that she would send money every month for them to have a party. Nation credibly testified that management had never previously provided money for such parties on a monthly basis. Based upon the total record evidence, including the testimony of Fago and the undisputed testimony of Nation, I find that Fago provided money for the pizza party and promised money for future parties for

²² Prior to her testifying, Counsel for the General Counsel submitted that Aliecia Allison would present evidence concerning this allegation. Allison did not address this allegation in her testimony.

employees and residents. There is no evidence that Respondent had a practice of providing these parties for employees on a regular basis as promised by Fago on July 12. Accordingly, the record evidence supports a finding that such benefits and promise of benefits were made to discourage employees' union activity in violation of Section 8(a)(1). Thus, merit is also found to complaint paragraph 5(b).

3. Alleged Interrogation

While it is not a per se violation of the Act for an employer to question an employee regarding his or her union membership, an interrogation which reasonably tends to restrain or interfere with an employee's exercise of rights guaranteed by the Act is unlawful. *Rossmore House*, 269 NLRB 1176 (1984), enforced 760 F.2d 1006 (9th Cir. 1985). In determining whether there has been such interference, the Board looks at the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunny Vale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Thus, the Board considers whether under all the circumstances, the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB No. 141, slip op. at 7 (2000).

Complaint paragraphs 6(a), 7(e), (m), and (n) allege that Steier and Bell interrogated employees regarding their support for the Union. Anna Burden testified that after her participation in a meeting of the Peer Council on August 3, Steier asked: "how do you think it's going?" Burden responded: "right now, I think 50/50." While Burden recalled that Steier responded, she could not recall what he said. She did recall, however, that Steier went on to ask her how she felt about the Union. She explained that prior to that time she had been one hundred percent union, however she was no longer so sure. She told him that since he promised to turn things around and change things that were wrong, she was no longer sure of her feelings. While Steier's initial question "how do you think it's going?" was somewhat ambiguous, his follow-up question clearly sought to ascertain Burden's union sentiments. Steier was asked on direct examination if he recalled a conversation with Burden. Steier responded that while he was there a "lot of people" came to talk with him; however, he didn't really know names per se. While Steier gave extensive testimony about his conversations with employees about the status of the facility, Steier did not deny the alleged interrogation or rebut Burden's testimony. The circumstances surrounding this questioning demonstrate the interference of employee rights as contemplated by the Board. The evidence reflects that Burden was questioned away from her work area by HQM's president. The totality of the circumstances indicate that such an inquiry would reasonably tend to interfere with, and restrain an employee in the exercise of their Section 7 rights. Accordingly, I find the total record evidence to support a finding that Steier unlawfully interrogated an employee regarding the employee's support for the Union as alleged in complaint paragraph 6(a).

Aliecia Allison testified that in an individual conversation with Bell at the end of July or the first of August, Bell stated that sometimes he felt that she was with him and other times he felt that he was losing her. While Allison testified that she presumed that he meant that he was not sure how she was going to vote, there is no evidence that Bell said anything further to relate his question to the union election. Allison also recalled that on July 6, Bell asked employee Amy Waldrige Kidwell and her if they were "on his bus." Bell did not recall any conversation with Allison about being "on his bus." He recalled that he had a discussion with someone about the bus analogy and explained that the analogy comes from a book on

management science.

Carmen Graham testified that in a meeting with Howe and Bell on approximately July 7, Bell asked her if it was too late. When she responded “too late for what?” he said “too late to turn them around.” Graham asked if he meant the Union and he confirmed that was what he meant. Graham told him that she did not know and he would have to ask the individual employees. Bell testified that he might very well have had a conversation with Graham; however, he did not recall if he did. Bell testified that he did not recall making the statement to Graham.

Respondent argues that Bell’s alleged comments to Graham and Allison were too vague and ambiguous to be unlawful interrogation in violation of the Act. I agree. While crediting the testimony of Allison and Graham, I nonetheless find the alleged statements by Bell to be too vague to constitute unlawful interrogation. *Walgreen Company*, 221 NLRB 1096, 1099 (1975). In view of my finding, I recommend the dismissal of complaint paragraph sections 7(m) and (n). I do, however, find that Bell’s interrogation of Graham on July 7 was violative of 8(a)(1) and I find merit to complaint paragraph 7(e).

Complaint paragraph 6(c) alleges that on or about August 5, Steier polled its employees by asking for a show of hands of those employees who supported the Union. In talking about Steier’s August 5 meeting, employee Washburn testified:

It began, they had a financial statements there and they were going to explain why we were running in the red and why we’re losing money. And it went on, he asked for a show of hands of people that supported the Union, to take one of the financial statements out to the Union workers and former employees on the line out there.

When Brenda Nation testified concerning Steier’s meeting, she recalled that after passing out the financial report, Steier asked if there were any people for the Union to take one of the booklets out to give to the Union people. Sandy Williams testified that Steier told employees that he would like for the Union to have a copy of the report and he asked who was for the Union. Williams recalled that he asked employees who were pro-Union to raise their hands.

Steier denied that he asked the Union supporters to raise their hands during the meeting. He described the meeting as having a lot of interactive questions related to the functioning of the facility. He recalled that he asked employees to identify themselves as having worked at the facility in 2002 and also who liked the new administrator being introduced.

As Counsels for the General Counsel points out in their brief, polling of employees is unlawful unless employees are told that the poll is to determine the Union’s majority status, assurances against reprisal are given, employees are polled by secret ballot, and the employer has not engaged in unfair labor practices or created a coercive atmosphere.²³ There is no dispute that Respondent attempted to include as many employees as possible in this August 5 meeting. Steier testified that employees from all three shifts attended. Keeling

²³ *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

estimated that as many as 50 to 75 people were in attendance. Despite this large number of employees in attendance, only these very few employees recalled that Steier asked Union supporters to identify themselves by raising their hands. Based upon the overall record evidence, I do not find these employees recollection to be credible with respect to the alleged polling. While there are a substantial number of alleged 8(a)(1) violations involved in this case, I have found only two isolated instances unlawful interrogation. It is apparent that this is a sophisticated employer who has undergone union campaigns at other facilities. It is simply unrealistic that Steier would exhibit such blatant conduct in the presence of 50 to 75 witnesses. I think that it is more realistic that Steier asked for a volunteer to take the financial statement to the Union and such a request was mistakenly confused by these few witnesses. Accordingly, I do not find the total record evidence to support complaint paragraph 6(c).

4. Respondent's Restriction on Wearing Union Stickers

Complaint paragraph 7(i) alleges that about July 2004, Bell told a meeting of employees that they could not wear union buttons. Complaint paragraph 8(e) alleges that about July 10, Howe ordered an employee to remove a union sticker that the employee wore at work.

The record reflects that approximately 15 employees wore union stickers when they reported to the facility to pick up their checks on July 2. Although Administrator Veteto acknowledged that employees wore the union stickers in the facility, she did not prohibit them from doing so. Veteto also testified that Respondent did not have a policy prohibiting employees from wearing stickers, buttons, or non-work related items affixed to their uniforms. Employees Graham and Hilbert testified that employees had previously worn pins and similar items on their clothing at work. In contrast to past practice; however, Howe told Glenna Hilbert on July 10 that she could not wear the union sticker inside the facility.

Howe admits telling Hilbert to remove the Union sticker. Howe testified that she did so because one of the resident's family members complained about the sticker. Howe did not identify the name of the individual who complained. Respondent argues that it was lawful for Howe to prohibit Hilbert's wearing of union insignia because Hilbert was in a patient care area. Respondent asserts that it allowed employees to wear union insignia in non-patient care areas as demonstrated by the testimony concerning the wearing of union stickers on July 2. Respondent distinguishes the wearing of union stickers in the dining room on July 2 and Hilbert's wearing of the union sticker in the hallway on July 10. Respondent argues that consistent with longstanding Board precedent,²⁴ Respondent lawfully requested the removal of union insignia during work time and in patient care areas.

Certainly Respondent, as a healthcare facility, has the right to restrict employee solicitation and distribution in immediate patient care areas even during nonworking time. *Baptist Hospital*, 442 NLRB U.S. 773, 786-787 (1979); *Beth Israel Hospital*, 437 U.S. 483 (1978). The Board has found a rule that prohibits the wearing of union insignia in immediate patient-care areas is presumptively valid. *Mesa Vista Hospital*, 280 NLRB 298 (1986). The Board has nevertheless also looked to whether the health care facility "promulgated the rule to promote the health and welfare of its patients or to thwart the

²⁴ Respondent cites *Vista Hill Foundation*, 280 NLRB 298, 299 (1986) and *Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117, slip op. at 12 (2004).

employees' right to organize." *Fairfax Hospital*, 310 NLRB 299, 307 (1993). Additionally, I note that while a health care facility may prohibit employees' wearing union insignia in patient care areas, there is no authority for selective enforcement of an otherwise valid rule. The record reflects that Respondent's rule concerning the wearing of union insignia was only implemented after the initiation of the Union campaign. Employees testified without contradiction that they were previously allowed to wear non-work related items on their uniforms without prohibition. Accordingly, even if Respondent's policy on the wearing of union insignia in patient care areas is valid, its implementation and enforcement against Union supporters renders such enforcement unlawful. *Vincent's Hospital*, 265 NLRB 38, (1982), *enfd.* in part 729 F.2d 730 (8th Cir. 1984). Therefore, I find merit to complaint paragraph 8(e).

Sandy Williams testified that Bell told employees during a meeting held on July 27, at the facility that they were not allowed to wear union stickers inside the facility because the stickers were not part of the employees' uniform. Williams testified that Alice Grundy was also present at this meeting with Bell. Neither Grundy nor any other employee corroborated this alleged statement by Bell. Lacking any corroboration, I do not credit Williams' testimony concerning this allegation and I recommend the dismissal of complaint paragraph 7(i).

5. Bell's Alleged Identification of a Union Supporter

Complaint paragraph 7(h) alleges that about August 5, Bell identified an employee as a union supporter during a group meeting. Steier testified that he had not known how many employees would attend his August 5 meeting and he had a "lot of copies" of the financial report left over after the meeting. He recalled that he told employees that there were extra copies for anyone who didn't get one and he had no problem if they wanted to give a copy to the Union as well. He testified that he left approximately 10 or 12 copies in the room and he recalled that an employee took a copy out to the Union. He did not know if the employee did so at Bell's direction. Sandy Williams testified that after Steier mentioned that he wanted the Union to have a copy of the financial report, Bell told her to take a copy to the Union. Washburn recalled that Bell asked Williams to do so because she was a friend of the "people out there." Employees Grundy and Keeling also testified that Bell singled out Williams to take the report to the Union. Palmer recalled Steier giving the report to someone, but couldn't recall to whom. Burden testified that it was Steier who singled out Williams to deliver the report. Bell did not testify concerning the incident.

As discussed above, at least four employees recalled that Bell singled Williams out as the one to give the financial report to the Union. Steier did not dispute that Bell did so and Bell did not deny doing so. Accordingly, I credit the testimony of Grundy, Keeling, Williams, and Washburn in this regard and find that Bell singled out Williams as the employee to take the financial statement to the Union. While in the presence of a large group of people, Bell's actions were the equivalent of an interrogation concerning Williams' union sentiments. Bell's targeting Williams for this task could reasonably be viewed as requiring Williams to disclose her support for the Union or to disavow her affiliation with the Union. I find Bell's statement to be violative of Section 8(a)(1) of the Act.

6. Howe's Alleged Threat to Union Supporters

Complaint paragraph 8(a) alleges that on July 7, Howe stated in an employee meeting that she and Bell were there to "get rid of the troublemakers." Vickie Curtsinger

attended a meeting held by Howe and Bell a “couple of days” after they arrived at the facility. She recalled that the meeting was held in the dining room and attended by probably 30 or more people. She testified that after introducing themselves, Howe told employees that they were there to get rid of the troublemakers. Counsel for the General Counsel also offered the testimony of Billy Durham in support of this allegation. Durham recalled that approximately 50 employees attended the meeting. Durham recalled that Howe introduced herself and Bell. He recalled that Howe told the employees about Bell and mentioned something about his having a large family. Durham recalled that Bell then told employees that he wanted input from them on the problems and issues at the facility. Bell told employees that he was there to try to solve the problems and to take care of the issues. Neither Durham nor any other employee corroborated Curtsinger’s testimony concerning Howe’s alleged threat and I find no basis to credit her testimony. Accordingly, I find no merit to complaint paragraph 8(a).

7. Alleged Threats of Plant Closure

The complaint alleges 8 separate incidents in which Bell, Howe, Fago, Steier, and Englebrecht are alleged to have threatened or impliedly threatened that Respondent would close the facility if employees chose the Union to represent them. The Board and courts have repeatedly held that because of an employee’s natural interest in continued employment, threats of closure are “among the most flagrant” of unfair labor practices. *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 611 fn. 31 (1969); *NLRB v. Naum Bros., Inc.*, 637 F.2d 589, 592 (6th Cir. 1981); *Frito-Lay, Inc.*, 232 NLRB 753, fn. 11 (1977).

Fago testified that she visited Valley View in order to set the record straight on some of the information contained in the Union handbills and to address employees’ concerns about Veteto’s administration of the facility. In essence, she made the one-day visit to the facility to deal with the Union’s organizing and employees’ dissatisfaction with Respondent. While Fago denied that she made any threats to close the facility, the overall credible record evidence demonstrates otherwise. Employees Grundy and Nation credibly testified that when she visited employees in the Dietary Department, she slapped her hand down on the table and told them that she would close the facility before letting the Union come into the facility. While they did not recall her words exactly the same, the message was clear and their recall credible. Their recollection of the circumstances and of Fago’s actions was vivid and consistent.

Fago acknowledged that when she met with first and second shift employees on July 12, she told them that the facility had lost over \$3 million. Employee Dempsey testified that Fago told employees that facility had done nothing but lose money and that she would have already closed it if it had not been for her love for the employees working there. Dempsey also recalled that Fago told employees that she would close the facility before she would let someone come in and tell her what to do. Grundy and Nation also credibly testified that Fago talked about closing the facility. While there was some variance in the recall of Fago’s specific words to employees, the employees’ consistently recalled Fago’s message to them in the July 12 meeting. Fago clearly communicated to them that she could justifiably close the facility because it was not profitable. Only her positive feelings for the employees had kept her from doing so. Admittedly, she told employees that they had to work as a family and as a team. Based upon Fago’s comments, it is reasonable that employees would conclude that only their rejection of the Union would keep them in her favor and prevent the closure of the facility. Therefore, I find merit to complaint allegations 5(a) and (c).

Employee Aliecia Allison testified concerning a conversation that she had with Bell in late July or early August when she and employee Loren Miller asked him what would happen to the facility if the Union won the election. He told them that if he were Fago and had a facility losing money and a union were organizing; he would close the doors.

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Suffoletta-Smith testified that Howe and Bell met with approximately 50 people on July 7. Suffoletta-Smith testified that during the meeting, Bell mentioned that it did not matter whether Respondent had 70 or 71 facilities. She neither explained what precipitated the alleged comment nor did she provide any information about the context in which this statement was made. While employees testified that Steier made this statement during a later group meeting, no other employee corroborated Suffoletta-Smith's testimony concerning Bell's comment in the July 7 meeting. Accordingly, I find no basis to credit Suffoletta-Smith's recall and no merit is found to complaint paragraph 7(d).²⁵

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Perhaps the most significant testimony concerning threats and implied threats of closure is related to Steier's August 5 meeting with employees. Respondent argues that statements by Steier, Englebrecht, and Bell were all in response to statements by Union supporters and/or information passed out by the Union. Respondent asserts that the Union passed out documents portraying Fago as having made a fortune buying and operating nursing homes. Respondent asserts that the Union intended to convey to employees the perception that Fago and HQM were making a significant amount of money from her investment in Valley View, and that the Union would secure better wages and benefits for employees. Respondent asserts that in response, both Steier and Bell set the record straight regarding the financial condition of Valley View. Respondent contends that Steier's comments to employees on August 5 were based upon objective factors. Respondent also asserts that an employer may make predictions as long as there is no threat of reprisal. In their brief, Counsels for the Respondent assert: "The fact that closure might result from its default on its obligations to the REIT and the fact that closure might result from problems associated with collective bargaining were an economic reality – not a threat."

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Respondent cites court decisions in which it has been found that an employer is permitted to predict an increased risk of closure due to unionization as long as the prediction is grounded on objective economic factors.²⁶ I do not find Respondent's argument persuasive with respect to the record evidence herein. It is undisputed that Respondent distributed the financial statement to show the losses sustained by Valley View and Steier testified that he talked with employees about the facility's being in default of its financial obligations to the REIT. Based upon Steier's testimony, it is apparent that he warned employees that the facility could close and he gave some economic reasons for its doing so. Unlike those cases relied upon by Respondent, Steier did not, however, offer any explanation of why unionization would necessarily lead to an adverse action by the bank.

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²⁵ Complaint paragraph 8(b) alleges that on July 7, Howe threatened closure if the employees selected the Union as their collective-bargaining representative. Based upon the record evidence, it appears that this is the same threat alleged by Suffoletta-Smith concerning Bell during their July 7 meeting with employees. While Suffoletta-Smith alleged that Bell made the alleged threat, no employee testified that Howe made such a threat during this meeting. Accordingly, I find no merit to complaint paragraph 8(b).

²⁶ *General Electric Co. v. NLRB*, 117 F.3d 627, (D.C. Cir. 1997); *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130 (D.C. Cir. 1994).

There was no prediction of closing due to unionization based upon objective economic factors. In the alternative, Steier reaffirmed to employees the message delivered earlier by Bell and Fago. Respondent's message was clear that the future of Valley View was financially precarious. Valley View was only one of 71 facilities and at risk for closure. It is undisputed that both Steier and Englebrecht specifically discussed Englebrecht's experience in closing other nursing facilities. All of this information was communicated to employees during discussions about the Union and clearly in response to the employees' union organizing. Accordingly, it is reasonable that employees would conclude that closure would result if they continued to support the Union. Accordingly, I find merit to complaint paragraphs 5(a), (c), 6(b), (d), 7(l), and 9.

B. Respondent's Termination of Employees During the Union Campaign

General Counsel alleges that Respondent unlawfully terminated the employment of four employees between July 8 and August 7, 2004. In determining whether an employer's actions against an employee violates Section 8(a)(3) of the Act, the Board uses the analytical framework set out in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Wright Line* is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. *American Gardens Management Co.*, 338 NLRB No. 76, slip op., at 2 (2002). When an employer is alleged to have violated 8(a)(3) in discharging its employees, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the discharge. To meet this burden, General Counsel must offer credible evidence of union activity, employer knowledge, and employer animus. *Briar Crest Nursing Home*, 333 NLRB 935 (2001). Unlawful motivation is most often established by indirect or circumstantial evidence, such as the suspicious timing of disciplinary action, pretextual reasons given for the discipline and disparate treatment of the discriminatees compared with employees without known union sympathies, and an employer's deviation from past practices. *Vico Products Co.*, 336 NLRB 583, 587 (2001); *W.F. Bolin v. NLRB* 70 F.3d 863, 871 (6th Cir. 1995).

Once unlawful motivation is shown, the burden of persuasion shifts to the respondent to provide its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line* above at 1089 and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

1. Billy Durham's Discharge

Respondent argues that Durham was discharged because he left his medications cart unlocked twice on July 8. Respondent contends that REI Educator Christa Masden, with Howe's approval, made the decision to terminate Durham. Respondent asserts that discriminatory motive cannot be established because there is no evidence that Masden had any familiarity with Durham or his pro-union sentiments. Masden, however, denied that she had any involvement in the decision to terminate Durham.

It is undisputed that Respondent's local and corporate management officials were totally unaware of employees' organizing efforts until the Union had sufficient support to file a petition for an election. Once Steier learned of the petition and the organizing efforts, Bell and Howe were dispatched to Taylorsville to deal with the situation. Masden was the

Assistant Director of Nursing at HQM's Louisville facility. Respondent's corporate office directed her to go to Valley View on July 7 and she was told there were clinical and systematic problems in the facility that needed attention. Masden attended a meeting with Bell, Howe, and Respondent's regional clinical compliant specialist Barbara Sargent when she arrived at the facility on July 7. She learned in that meeting that there was a union campaign and that a petition had been filed.

Durham was terminated within two days of Bell and Howe's arrival at the facility and the day after Masden's arrival at the facility. At the time of his discharge, Durham had been employed for two years as a Certified Medical Technician or CNA. Previously, he had worked at the facility as Admissions Director for two years. His wife was a manager in Human Resources and Payroll. There was no evidence that Durham had any prior discipline.

There is no evidence that Durham wore a union sticker or an open display of his support for the Union. While he testified that he signed a union authorization card and spoke with other employees in support of the Union, there is no evidence that Respondent was aware of such activity. His demonstrated union activity was primarily limited to his outspoken comments during the meeting with Howe and Bell on July 7. Employees credibly testified that Durham spoke out during the meeting. Respondent does not dispute that he did so. Durham questioned Bell as to whether employees could believe that conditions would improve at the facility. He pointed out to Bell that management had not resolved the issues that employees had previously brought to their attention. Durham was terminated the day after he spoke out during the meeting.

Durham asserts that he was familiar with the regulations in dispensing medications from his cart. His testimony indicates that as he normally dispensed medications, it was not unusual for his cart to be unlocked when he was in the area of the cart and the cart was in his full view. Counsels for the General Counsel point out that Masden reported the incident with the med cart directly to Bell and Howe rather than to the Director of Nursing who was his supervisor or even to Administrator Veteto. Counsels for General Counsel assert that such action raises the inference that she was merely a tool of the corporate leadership and evidences an unlawful motive. Additionally, Masden acknowledges that Howe recommended discipline for Durham and Howe acknowledged that she participated in the decision to terminate Durham.

The overall evidence reflects that immediately upon learning of the union organizational activity, Respondent dispatched Howe, Bell, Masden, and other corporate personnel to Valley View. The day after Durham spoke out against Respondent's management, Respondent seized the opportunity to terminate him. He had no prior discipline. He was married to a member of local management and had, in fact, been a part of management himself during his previous employment period with Respondent. There was nothing to indicate that he had been other than an exemplary employee for Respondent. The only thing that was different for Durham on July 8 was the fact that he had spoken out against Respondent the previous day.

Respondent points out that even though employee Carmen Graham also spoke up during the July 7 meeting, she was not terminated. Respondent's failure to discharge Graham, however, does not diminish the evidence of Durham's discriminatory discharge. Graham's testimony reflects the following:

Q: - - you mentioned you spoke up as well?

A: Yes, I spoke up after Billy.

5 Q: What did you say?

A: Same thing about towels and washrags and stuff.

10 Durham was also distinguishable from Graham by the fact that he was married to Valley View's Human Resources Manager. The fact that Respondent terminated her on the same day as Durham raises the inference that Respondent was motivated to not only remove an active union supporter from the facility, but to also remove his wife as a source of information to the Union about management's campaign strategy.

15 Respondent also argues that General Counsel has not shown any disparate treatment in Durham's discharge. Respondent submits that it offered evidence to show that two other employees were disciplined for similar conduct. The documents, which related to facilities other than Valley View, were not found to be relevant and were placed in the rejected exhibits file. Additionally, I note that the disciplinary actions that Respondent sought to introduce into evidence were not similar to that imposed upon Durham and in fact
20 demonstrate Respondent's disparate treatment of Durham. One of the documents submitted by Respondent reflects that an employee, at a facility other than Valley View, received a written warning for leaving medication at a patient's bedside and putting the patient at risk. Certainly, an employee's leaving medication within a patient's room and within reach of a patient is distinguishable from Durham's alleged infraction on July 8. Contrary to the action
25 taken with Durham, the employee was only warned and not terminated. The second discipline that Respondent sought to introduce into the record reflects that an employee, at a facility other than Valley View, received a warning for leaving her med cart unsecured. Just as Respondent alleged with Durham, the warning reflects that such incident occurred twice in one day. Unlike Durham however, the employee was not terminated and was given only a
30 written warning. Thus, Respondent's own proffered records reflect disparate treatment in terminating Durham.

35 Based upon the total record evidence, I find that General Counsel has met its burden under *Wright Line* and has demonstrated that Durham's union activity was a motivating factor in Respondent's decision to terminate him on July 8. Inasmuch as Respondent has not demonstrated that it would have terminated him in the absence of his union activity, I find that Respondent terminated Durham in violation of Section 8(a)(3) and (1) of the Act.

2. Respondent's Termination of Ryan Orr

40 Counsels for the General Counsel assert that Orr signed a union authorization card, promoted the Union to his co-workers, and was a visible supporter as he was one of the employees who wore a Union sticker to work. General Counsel also submits that Respondent had knowledge of his participation in the Union campaign when Veteto engaged
45 in surveillance of his meeting with Hernandez and other Union supporters. The total record evidence, however, does not demonstrate that Respondent had knowledge of Orr's Union sentiments prior to his discharge.

While Orr may have signed a union authorization card, the record contains no evidence that management official or agent of Respondent knew that he did so. While Orr

testified that he spoke with co-workers about the Union, he neither identified the names of those employees nor did he provide any further details that would demonstrate that Respondent was aware of his doing so. The only occasion that he wore a Union sticker to the facility was on July 2. He identified Nursing Director Railley and Administrator Veteto as the managers who would have been present on that day. When asked if he saw them, he denied that he did. When pressed further by Counsel for the General Counsel, he added that he was not sure that he saw them, however, he didn't recall interacting with them that day. It is undisputed that he attended one union meeting at the Dairy Queen. He initially testified that the meeting occurred the day before the Union filed the petition for election. Later, he testified that at the time of the meeting, the petition was scheduled to be filed later in the week. When asked to describe what occurred during the meeting, Orr made no reference to seeing Veteto or any other management official. Veteto admitted that she went to the Dairy Queen to see if employees were meeting on June 30. She did not, however, recall seeing Ryan or any other employees when she drove the Dairy Queen parking lot. Thus, the record does not contain any credible evidence that Respondent had any knowledge of Orr's union sentiments or activity.

Even assuming that Counsel for the General Counsel established a prima facie case, Respondent has demonstrated that it would have terminated Orr in the absence of any union activity. Respondent's "Policy for Adult Protection" provides that physical mistreatment or abusive language to any individual is prohibited. At the time of Orr's termination, he was still in his 90-day probation period. Howe testified, without contradiction, that HQM general terminates employees who fail to perform to standards during their probationary period.

Orr received his first written warning on July 17 and only six weeks after he began his employment. The warning was based upon conduct witnessed by Suffoletta-Smith. The warning was given for Orr's refusal to get a resident up after specifically being told to do so and for failing to turn a resident as required by the schedule. Orr was counseled but not terminated. On July 21, Director of Nursing Railley received a second allegation of Orr's improper conduct. Orr was alleged to have failed to notify a nurse of a patient's request for pain medication and for also directing the resident in a harsh tone to stop pushing her call light. In responding to the allegation of verbal abuse to a resident, Orr acknowledged that due to the circumstances, he could understand that his tone of voice did not sound pleasant and he apologized. Respondent asserts that Orr tacitly admitted that he used a "harsh tone" with the resident.

Thus, the overall evidence does not support a finding that Ryan Orr was discriminatorily terminated in violation of Section 8(a)(3) and (1) of the Act.

3. The Discharge of Natalie Suffoletta-Smith

a. Supervisory Status

A threshold issue in determining whether Suffoletta-Smith was unlawfully discharged is the determination as to whether she was a statutory supervisor at the time of her discharge. Respondent asserts that she is a supervisor as defined by Section 2(11) of the Act. As Counsel for the General points out in brief, an employer claiming that an employee is a supervisor under Section 2(11) of the Act has the burden of proving the supervisory

status.²⁷

Section 2(11) of the Act defines as supervisor as:

5 Any individual having authority, in the interest of the employer, to hire transfer,
suspend, layoff, recall, promote, discharge, assign, reward, or discipline other
employees, or responsibly to direct them, or to adjust their grievances, or
effectively to recommend such action, if in connection with the foregoing the
10 exercise of such authority is not a merely routine or clerical nature, but
requires the use of independent judgment.

Under the Supreme Court's decision in *Kentucky River Community Care*, 532 U.S.
706, 712 (2001), employees are supervisors if: (1) they hold authority to engage in one of the
12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine
15 or clerical nature, but requires the use of independent judgment, and (3) their authority is
held in the interest in the interest of the employer.

At the time of her discharge, Suffoletta-Smith was an LPN on a shift that ran from
7:00 a.m. in the morning until 11:00 p.m. in the evening. She reported to the Director of
20 Nursing. Respondent contends that the Administrator and Director of Nursing left the facility
around 6:00 p.m. each day and that Suffoletta-Smith was thus "in charge" of the facility,
including the supervision of employees. Counsel for the General Counsel, however, asserts
that being the highest-ranking employee on the premises or the "weekend" supervisor does
not necessarily make that employee a statutory supervisor, particularly where a supervisor is
25 on call. *Wilshire at Lakewood*, 343 NLRB No. 23, slip op. at 3 (2004).

Respondent asserts that Suffoletta-Smith exercised independent judgment in the
discipline of other employees and submits that Suffoletta-Smith's July 17 warning to Orr
demonstrates such independent judgment. There is no dispute that Suffoletta-Smith signed
30 the warning give to Orr. She testified, however, that she was ethically required to report any
instance of potential patient abuse. Her failure to do so could result in the loss of her license.
She acknowledged that she could write-up an employee; however the write-up was
forwarded to the Director of Nursing to determine if discipline was appropriate. She credibly
testified that she did not have the authority to recommend discipline when she wrote-up an
35 employee. Other than the write-up of Orr, Respondent submitted no other records to
demonstrate that Suffoletta-Smith had written up other employees or had been involved in
the discipline of any other employees.

The overall record demonstrated that Suffoletta-Smith was often the most highly
40 trained nursing employee in the facility for a portion of her shift. Veteto testified, however,
that if anything unusual occurred during an LPN's shift, they were to call either Veteto or the
Director of Nursing. The evidence reflects that floor nurses spent their work time engaged in
patient care and charting. Dempsey, Palmer, and Suffoletta-Smith testified that the floor
nurses did not spend any part of their day on supervisory functions. The evidence reflects
45 that any direction floor nurses give to Certified Nursing Assistants would have been merely of
routine nature that did not require the exercise of independent judgment. With the exception

²⁷ Citing *Masterform Tool Co.*, 327 NLRB 1071, 1071-1072 (1999); *Panaro and Grimes*, 321
NLRB 811, 812 (1996).

of its argument relating to the warning to Orr, Respondent provided no evidence of any specific incidents demonstrating such independent judgment.

In the Board's recent case in *Wilshire at Lakewood*, the employer alleged that a registered nurse was a statutory supervisor. The nurse was not only identified as a "weekend supervisor" but also attended management meetings and received more pay than the employer's charge nurses. The nurse checked to see if other employees were doing their tasks correctly and she could correct the employees if they did something wrong. If there was a gross infraction of patient care, she and other nurses not alleged to be supervisors, could write up the employee on a disciplinary form. The Director of Nursing or the Administrator reviewed the form to determine if discipline was warranted. In finding that the nurse was not a statutory supervisor, the Board noted that there was no evidence that the nurse had the authority to discipline employees. Any "authority" to correct other employees was found to be insufficient to show that she exercised independent judgment in directing employees in the performance of their duties as required by Section 2(11). *Ibid*.

In the instant case, Suffoletta-Smith appears to have had even less authority than that of the nurse in issue in *Wilshire at Lakewood*. Based upon the total record evidence, I do not find that Suffoletta-Smith possessed any indicia of supervisory authority as defined by Section 2(11) of the Act.

b. Whether Suffoletta-Smith Was Unlawfully Terminated

It is undisputed that as an LPN, Suffoletta-Smith was not in the group of employees for whom the Union was seeking representation. Respondent asserts that Counsel for the General Counsel has failed to establish a *prima facie* case of Suffoletta-Smith's discharge because there is no evidence that Bell or Howe knew of her support for the Union. Counsel for the General Counsel submits that Suffoletta-Smith was clearly engaged in protected activity when she signed a union card, wore a pro-Union sticker to work to pick up her paycheck, and defended the Union in the July 6 meeting. Counsel for the General Counsel asserts that the fact that she was terminated two weeks after wearing the Union sticker to work and publicly defending the Union in the July 6 meeting was suspicious. Respondent asserts that Counsel for the General Counsel has failed to establish a *prima facie* case of Suffoletta-Smith's discharge because there is no evidence that Bell or Howe knew of her support for the Union. Counsel for Respondent asserts in brief that "HQM had absolutely no notice" of her union sympathies prior to her termination.

While Suffoletta-Smith signed a union card on June 24, there is no evidence that any member of management was aware that she did so. She testified that she wore a Union sticker on her shorts when she came to the facility on July 2 to pick up her check. She recalled that Lisa Veteto, Rhonda Dempsey, Barbara Railley were present that day. She denied that any manager said anything to her about the sticker. She testified that when Carmen Graham, a CNA, saw the sticker, she questioned Suffoletta-Smith why she was wearing the sticker when the Union was for CNA's and not nurses. Suffoletta-Smith agreed and explained that she was wearing the sticker in support of the CNA's. Suffoletta-Smith testified that Veteto had been standing about 10 feet behind her and Graham. Rhonda Dempsey was a member of management at the time of Suffoletta-Smith's discharge. She testified that during the campaign, she talked with Bell and Howe about which employees were thought to be supporters of the Union. Bell kept a running list of percentages of employees who were supporters of the Union. Dempsey recalled that during these

conversations, Anna Burden, Uley Washburn, Glenna Hilbert and Vickie Curtsinger were identified to be supporters of the Union. Dempsey also recalled that Sandy Williams and Billy Durham were also identified as Union supporters. Dempsey did not include Suffoletta-Smith as one of the individuals thought to be a Union supporter. While both Veteto and Dempsey testified, neither corroborated management's knowledge of Suffoletta-Smith's wearing of the Unions ticker on July 2.

Suffoletta-Smith attended the meeting held by Howe and Bell on July 6. Throughout the meeting, employees told Bell and Howe about their concerns about budget cuts, insurance, and inadequate supplies. She recalled that she mentioned during the meeting that her husband was in a union and she understood about union benefits for employees. She also testified that Bell mentioned a magazine article about unions beating up families and blowing up cards. She testified that she had laughed and said: "That was back when Jimmy Hoffa was in the union." Suffoletta-Smith explained that she made the statement out loud and directed it to Bell. She did not clarify, however, if Bell said anything in response or in any way indicated that he heard her statement. No other employee attending the meeting corroborated Suffoletta-Smith's comment about Jimmy Hoffa.

Based upon the above, there is clearly insufficient record evidence to establish that Respondent had knowledge of her Union sentiments. She was not a member of the proposed bargaining unit and would not have voted in the election. Her isolated reference to her familiarity with union benefits is simply not enough to designate her as a union adherent necessitating removal.

Suffoletta-Smith acknowledged that the prior to her discharge, there had been an incident involving her failure to respond to a resident's call light. She explained the circumstances of that incident and explained in her testimony why she was unable to respond to the resident's call light. Respondent submits that if Bell were looking for a pretext to terminate Suffoletta-Smith because of her pro-union beliefs, he would have terminated her for her conduct the previous week. Respondent asserts that Bell did not terminate her for the previous incident because he was not looking to terminate her for her alleged pro-union sentiments. Respondent contends that she was terminated on July 20 because of her insubordination. Suffoletta-Smith admitted that when talking with Respondent's corporate insurance representative, she ridiculed Bell and described him as a "used car salesman." When Bell attempted to discuss her behavior, she told him that she did not want to talk with him and walked away. While Bell may have been somewhat thin-skinned about a fairly trivial matter, her behavior was arguably insubordinate. Even if General Counsel had established a *prima facie* case of discriminatory discharge, Respondent has demonstrated that it would have terminated Suffoletta-Smith in the absence of any union activity. Accordingly, I do not find that Respondent terminated Suffoletta-Smith in violation of Section 8(a)(3) and (1).

4. The Discharge of Sandra Williams

Sandra (Sandy) Williams was terminated on August 7; two days after Steier's meeting and four days before the election. As discussed above, the total record evidence indicates that Bell specifically singled out Williams to take a copy of the financial report to the Union. Neither Steier nor Bell disputes this occurrence. Anna Burden recalled that when Williams was asked to take the financial report to the Union, another employee spoke up and volunteered to do so. When Burden was asked if Williams said anything in response, Burden responded: "No, she was too humiliated." Therefore, Howe's conversation with Williams

occurred only two days after Williams had been singled out and scrutinized in front of her fellow employees. It is reasonable that Williams was still uncomfortable and wary of Respondent's corporate management officials who were present at the facility during the pendency of the election. Williams does not deny that she did not initially respond to Howe's greeting on August 7. She testified that she told Howe that she was still upset about the way that Bell treated her in the August 5 meeting.

Howe testified that when she continued to press Williams to speak to her, Williams told her: "I don't need to fucking talk to you." Respondent contends that Williams did not deny that she made this statement as she testified that she could not recall the exact words she used other than telling Howe that she was upset.

As the Board stated in *Piper Realty Co.*, 313 NLRB 1289, 1290 (1974), "Thus, although employees are permitted some leeway for impulsive behavior in engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." In striking this balance, each case is based upon its own facts. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964); *Chrysler Corp.*, 249 NLRB 130, 132 (1980). The Board has, however, recognized that an employer may not provoke an employee to the point where he commits an indiscretion and then rely upon it for dismissal. *NLRB v. M&B Headware Co.*, 349 F.2d 170, 174 (4th Cir. 1965); *NLRB v. Tennessee Packers, Inc.*, 339 F.2d 203 (6th Cir. 1964). Not every act of insubordination or even the use of profanity by an employee will render union and other protected concerted activities unprotected. *Morton International Inc.*, 315 NLRB 564, 567 (1994).

Counsel for the General Counsel submits that Howe was not seeking to build a friendship with Williams, but only to bait her. The evidence tends to support this hypothesis. There is no evidence that Williams refused a work directive by Howe or any other management official. Her only "offense" was in not responding to Howe's saying "hello." There is no dispute that when told that she had to give a social greeting, she did so. Even assuming that Williams used the profanity as Howe alleges, the evidence demonstrates that she was not only provoked to do so by Bell's previous attack, but also by Howe's obvious attempt to goad her further.

Accordingly, I find that General Counsel has established a *prima facie* case that Williams' union activity was a motivating factor in Respondent's decision to discharge her. Respondent asserts that Williams received a written warning for "getting into words" with a co-worker and assistant manager in April 2003. The warning, however, reflects that a subsequent infraction would result in suspension. If, assuming that Williams was insubordinate as alleged, Williams was not suspended. She was terminated. Thus, Respondent has not demonstrated that Williams would have been discharged even in the absence of her union activity. Therefore, I find that Respondent terminated Williams in violation of Section 8(a)(3) and (1) of the Act.

IV. Representation Case Findings and Conclusions

Pursuant to the Regional Director's Order of January 25, 2005, the parties presented evidence with respect to Union objections 1, 2, 3, 4, 5, 6, 8, 10, and the portion of objection 9 alleging the discharges of Billy Durham, Natalie Suffoletta-Smith, Ryan Orr, and Sandra Williams. Objections 1, 2, 3, 4, 5, and 6 allege the same conduct contained in various paragraphs in the amended consolidated complaint. Only Union objection 8 alleges conduct

that is not also included in the amended consolidated complaint. Union objection 10 is conclusionary and alleges that Respondent's conduct affected the results of the election.

A. Findings With Respect to Individual Objections

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Objection 1 alleges that Respondent threatened to close the facility if workers chose union representation. As discussed above, I find that Fago, Steier, Bell, and Englebrecht threatened to close the facility if the employees selected the Union as their bargaining representative and as alleged in complaint paragraphs 5(a), (c), 6(b), (d), 7(l), and 9. Accordingly, merit is found to the Union's objection.

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Objection 2 alleges that Respondent interrogated employees as to their union sympathies. As discussed above, I find that Steier and Bell interrogated employees regarding their support for the Union as alleged in complaint paragraphs 6(a) and 7(e). Accordingly, merit is found to the Union's objection.

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Objection 3 alleges that Respondent conducted surveillance on union meetings and handbilling activities. As I discussed above, I find that Veteto engaged in surveillance of employees' union activities and confirmed her surveillance as well as threatened unspecified reprisals as alleged in complaint paragraphs 10(a) and (b). Merit is found to the Union's objection.

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Objection 4 alleges that Respondent forced the removal of union insignia from union supporters contrary to company policy and past practice. As discussed above, I find that Howe ordered an employee to remove a union sticker on July 10 as alleged in complaint paragraph 8(e). Accordingly, merit is found to the Union's objection.

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Objection 5 alleges that Respondent solicited grievances from its employees. As discussed above, I find merit to complaint allegations 5(d), 7(a), (b), (c), (f), (j), (k), and 8(c). Accordingly, merit is found to the Union's objection.

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Objection 6 alleges that Respondent provided cash for a new benefit and promised future benefits in order to induce workers to vote against the Union. As discussed above, I find merit to complaint allegation 5(b). Accordingly, merit is found to the Union's objection.

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Objection 9 alleges that Respondent terminated several employees because of their membership in or activities on behalf of the Union. As discussed above, I find that Respondent terminated Billy Durham and Sandy Williams because of their support for the Union. With respect to these discharges, merit is found to the Union's objection.

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Objection 8 alleges that Respondent invited the local Chief of Police to be present on company property on the date of the election to intimidate voters. Chief Mike Villanova has been the Chief of the Taylorsville, Kentucky Police Department for almost 21 years. He testified that he first found out that there was a union campaign at Valley View when he visited his brother who was a resident at the facility. He acknowledged that he was present at the facility on the day of the election. He explained that it was not uncommon for local businesses to request assistance or extra patrol when they have special events. He explained that he went to the facility on the day of election as a part of his routine job. Villanova credibly testified that no one from Valley View requested that he go there. He explained that he took it upon himself to go there to observe and to do what he viewed as a

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part of his job as Chief of Police. He testified:

5 Taylorsville has never seen anything like this, and neither have I. In 21 years, we've never had any, you know, situations come up where there were people asking for the position of union.

 We've never had unions come in to the Taylorsville area. And so was – You know, it was even put in the newspaper that this was taking place.

10 Villanova recalled that after the article in the newspaper, he received telephone calls from several people in town whose relatives were residents of Valley View. They asked him if they would be allowed to visit their relatives on the day of the election. He assured the callers that he would be "close by" and assured the callers: "they're not out to cause any problems."

15 He recalled that when he arrived at the facility, it was still dark and around 6:00 a.m. He was on Valley View's property and near a privacy fence. He explained that the union supporters who were gathering outside the facility knew him and spoke to him. He added that everyone in town calls him by his first name. He recalled that he joked with them and
20 asked if they would bring him a cup of coffee from the Dairy Queen. After being at the facility for two to three hours, he received a telephone call from the city attorney who advised him that that it might not be wise for him to be on the property.

 Union Representative Hernandez testified that on the morning of the election,
25 Villanova questioned him as to whether the Union had the right to "politic 24 hours prior to the election" and asked handbillers to move. Hernandez recalled that he asked Villanova if someone at Valley View had given him this information because his statement had more to do with labor law than any other law. He testified that Villanova responded that he enforced all laws. Hernandez told him that such an objection would have to be made by an agent of
30 the National Labor Relations Board and Hernandez and others continued to handbill.

 Villanova testified that a union campaign was not only new to Taylorsville, but also to him. He explained that the only thing that he knew about unions was what he had seen on television. He recalled that he might have said something to the handbillers about his having
35 to check to see if they were allowed within a certain distance of the voting area. The handbillers told him that they could do so. He recalled that he tried to get in touch with someone with Valley View for verification but he had no success. There is no evidence that he pursued this inquiry or that he interfered with the handbillers.

40 The Union argues that objectionable election activity at or near the polls is given the strictest scrutiny. Counsel for the Union submits that Villanova's presence at Respondent's call and instruction is a *per se* violation, and the objection should be sustained.

45 Although police presence alone has not been considered sufficient consequence to require a new election, the election environment becomes tainted where the police "inject themselves into election issues" or "speak to any employees or voters during the election." *Louisville Cap Co.*, 120 NLRB 769, 771 (1958). Villanova acknowledges that he talked with the Union handbillers about how close to the voting area they were allowed to be on the day of the election. He also recalled that he jokingly spoke with other Union handbillers about bringing him coffee when they went to nearby Dairy Queen. There is no evidence, however,

that he spoke with voters or engaged in any other activity that brought him into the election issues. There is no evidence that he was present at the direction or request of Respondent. His mere presence on the property for a period of time on the day of the election does not warrant setting aside the election. *Vita Food Products, Inc. of Maryland*, 116 NLRB 1215, 1219 (1956). There is no evidence that his presence created a “general atmosphere of confusion or fear of reprisal such as to render impossible the free and untrammelled choice of a bargaining representative.” See *Atlantic & Pacific Tea Co.*, 120 NLRB 765, 767 (1958). Accordingly, I do not find merit to objection 8.

B. Representation Case Conclusions

Based upon my findings above, I conclude that the unfair labor practices committed by Respondent during the critical period constituted objectionable conduct that interfered with the free choice of employees in the election. Clearly, Respondent’s conduct warrants the setting aside of the election and the direction of a second election. *Mid-South Drywall Co. Inc.*, 339 NLRB No. 70, slip op. at 1 (2003). Therefore, I recommend that the election in 9-RC-17927 be set aside and I recommend the direction of a new election.

V. Other Issues Raised During the Hearing

Prior to the hearing, Respondent served a subpoena duces tecum on the Union requesting the production of “all documents, statements, audiotapes, videotapes, recordings, or transcriptions of all recordings” related to the “conduct claimed to provide the evidence in support of the unfair labor practices or the objections” alleged to have been committed by each named supervisor. The subpoena also requested the production of various other records involving organizational activities of named union representatives as well as the organizational activities of employees.

The Union filed a petition to revoke, asserting that the subpoena constituted discovery. The Union also asserted that the subpoena sought production of information concerning employees’ activities that were protected by the Act. The Union cited the Board’s decision in *National Telephone Directory Corp.*, 319 NLRB 420 (1995), where an employer served a subpoena on a union organizer seeking the production of authorization cards and other documents related to union activity. The Board found that the confidentiality interests of employees who have signed authorization cards and attended union meetings are paramount to the respondent employer’s need to obtain the identities of such employees for cross-examination and credibility impeachment purposes. The Board noted that the right to confidentiality exists for the protection of the employees, and thus cannot be waived by the union, but only by the employees themselves. In the instant case, the Union also argued that if the Union produced statements given by employees, such an action would have a chilling effect on any future exchange of information with employees.

Respondent argued at trial that the Union’s discovery argument did not apply because the subpoena did not require production of the documents prior to the trial. Ultimately, Respondent asserted that it was seeking the production of statements and documents provided by witnesses to the Union other than any witness statements that were provided by the Union to the Board during the investigation of the charges and objections. Respondent argued that it was entitled to review those statements in addition to the Board affidavits, and accompanying statements provided to the Board, prior to cross-examination of the witnesses. Respondent’s counsel argued that anything written by a witness that is

inconsistent with the testimony given on direct examination is “legitimate for a full and fair cross-examination.” During the trial, Respondent clarified that it was not seeking internal documents of the Union concerning organizational strategy; only the production of statements and documents provided by employees to the Union.

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After considering both the arguments of Respondent and the Union, I granted the Union’s petition to revoke the subpoena duces tecum with respect to the documents in dispute. I find nothing in the Board’s decisions to mandate such production.

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In a 1978 decision, the Supreme Court found that release of witnesses’ statements prior to unfair labor practice hearings necessarily “would interfere” in a statutory sense with the Board’s “enforcement proceedings” and thus such statements are exempt from disclosure until after hearing under the Freedom of Information Act. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). In *H.B. Zachary*, 310 NLRB 1037, 1038 (1993), the Board overruled an administrative law judge’s order that a union must turn over the affidavits in the union’s possession of witnesses who have neither been called by the General Counsel in its case, nor intended to be called by the union in its case. In reversing the administrative law judge, the Board noted that Section 102.118(b)(1) requires only the production of affidavits in the possession of the General Counsel after the witness has testified. The Board found that if the Union were required to also turn over the affidavits given to the General Counsel during investigation, the protections of *Robbins Tire* would be lost. The Board’s Rules and Regulations do, however, provide for the production of witness statements in the possession of the General Counsel for the purposes of cross-examination.²⁸

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In *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1997), the Board sustained the administrative law judge’s revocation of subpoenas to the union, finding that requiring the union to open its files to the employer would be inconsistent with and subversive of the very essence of collective bargaining and the quasi fiduciary relationship between a union and its members. In *Kaiser Aluminum*, 339 NLRB No. 100, slip op at 1, (2003), the employer subpoenaed the position statements submitted by the charging party to the Board’s regional office. When the Board endorsed the revocation of the subpoena, it looked to the confidentiality interests and policy considerations set forth in *Robbins Tire* above, as well as in *H. B. Zachary* above.

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In granting the petition to revoke the subpoena, I find it significant that the statements sought were not provided to the government. There is no record evidence to indicate that these employees were subpoenaed by the Union or had come to the Union other than voluntarily. I note that neither the evidence nor the parties’ arguments contradict that employees gave the statements as voluntary acts in dealing with the Union as the representative of their rights. I find that essentially a fiduciary relationship existed between the employees and the Union. An employee’s written statement given to the union is distinguishable from an employee’s written statement given to a Board agent. The very language imprinted upon a Board affidavit explains the circumstances under which the statement may be disclosed. The employee is made aware that the statement may be produced if the employee testifies in a trial. Such disclosure would not normally be a part of the exchange between the Union and the employee.

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²⁸ See B (1) of 102.118 of the Board’s Rules and Regulations. See also *Jencks v. The United States*, 335 U.S. 657 (1957).

In brief, Respondent argues that the confidentiality interests of the witnesses do not outweigh the prejudice to Respondent. In support of its argument, Respondent asserts that unlike the information sought in *Robbins Tire and National Telephone Directory Corp.*, the witness statements sought by Respondent do not directly relate to union organizing activity. Respondent contends that the statements relate to alleged objectionable conduct and unfair labor practices committee by Respondent. I do not find Respondent's argument to be persuasive. The very statements that Respondent demands were given to the union in its attempt to act as their representative and entwined with the employees' organizational activity.

In summary, I find that the Board's Rules and Regulations pertain to the disclosure of statements in the possession of the government and do not pertain to statements in the possession of the union or a third party. Inasmuch as the union has not provided the statements to the Board, the employees' right to confidentiality was not waived and the existing fiduciary relationship precluded the production of the employee statements. Accordingly, I find no basis for the production of the subpoenaed documents.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated the Act by engaging in the following conduct:

(a) Threatening to close its Taylorsville, Kentucky facility because of union activities.

(b) Threatening and impliedly threatening to close its Taylorsville, Kentucky facility if its employees selected the Union as their bargaining representative.

(c) Offering employees money for food and promising other benefits in order to discourage union activities.

(d) Soliciting employees' grievances and impliedly promising to remedy those grievances to discourage support for and activities on behalf of the Union.

(e) Interrogating employees regarding their support for the Union.

(f) Promising to pay employees' insurance-related telephone expenses and insurance claims.

(g) Engaging in surveillance of employees' union activities.

(h) Telling employees that it had engaged in surveillance and threatening employees with unspecified reprisals because of their Union activities.

(i) Identifying an employee as a union supporter during a group meeting.

(j) Promising and impliedly promising to provide employees with equipment and supplies to discourage support for and activities on behalf of the Union.

(k) Providing employees with supplies in order to discourage support for and activities on behalf of the Union.

(l) Selectively restricting an employee from wearing a union sticker.

(m) Discharging employees because they engaged in union or other protected activities.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act. By engaging in the above unfair labor practices, Respondent has interfered with the free choice of employees in the August 11, 2004 election.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Billy Durham and Sandy Williams, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:²⁹

ORDER

The Respondent, HQM of Spencer County, Inc., Taylorsville, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees that it would close the facility because of union activities.

(b) Threatening and impliedly threatening employees that it would close the facility if the employees selected the Union as their bargaining representative.

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Offering employees money for food and promising other benefits in order to discourage union activities.

5 (d) Soliciting employees' grievances and impliedly promising to remedy those grievances in order to discourage employees' union activities and support.

(e) Interrogating employees regarding their support for the Union.

10 (f) Promising employees to pay employees' insurance-related telephone expenses and insurance claims in order to discourage employees' union activities and support.

15 (g) Engaging in surveillance of employees' union activities.

(h) Telling employees that it had engaged in surveillance and threatening employees with unspecified reprisals because of their union activities.

20 (i) Identifying employees as union supporters in mandatory employee meetings.

(j) Promising and impliedly promising to provide employees with equipment and supplies to discourage employees' union activities and support.

25 (k) Providing employees with supplies in order to discourage employee activities and support.

(l) Selectively restricting employees from wearing union insignia.

30 (m) Discharging employees because they engaged in union or other protected activities.

35 (n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

40 (a) Within 14 days from the date of this Order, offer Billy Durham and Sandy Williams full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy

of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Taylorsville, Kentucky facility copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the election in Case 9-RC-17927 be set aside and the case remanded to the Regional Director for Region 9 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

Dated, Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

³⁰ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

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**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

10 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15 Form, join, or assist a union
 Choose representatives to bargain with us on your behalf
 Act together with other employees for your benefit and protection
 Choose not to engage in any of these protected activities

20 **WE WILL NOT** threaten you or impliedly threaten you that we will close Valley View because of your union activities and support.

WE WILL NOT offer you money for food and promise other benefits in order to discourage your union activities and support.

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WE WILL NOT solicit your grievances and impliedly promise to remedy those grievances in order to discourage your union activities and support.

WE WILL NOT interrogate you concerning your support for the union.

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WE WILL NOT promise to reimburse your expenses or promise to provide other services related to your benefits in order to discourage your union activities and support.

35 **WE WILL NOT** engage in surveillance of your union actives and **WE WILL NOT** tell you that we are engaging in surveillance of your union activities.

WE WILL NOT threaten you with unspecified reprisals for your engaging in union activities.

WE WILL NOT point you out or identify you as a union supporter in a public meeting.

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WE WILL NOT promise or impliedly promise to provide you with equipment or supplies in order to discourage you from your union activities and support.

45 **WE WILL NOT** provide you with supplies in order to discourage your union activities and support.

WE WILL NOT selectively enforce a restriction on your wearing union insignia.

We WILL NOT discharge employees because they support the United Food and Commercial Workers Union, Local 227, AFL-CIO, CLC or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

5 **WE WILL**, within 14 days from the date of the Board's Order, offer full reinstatement to Sandy Williams and Billy Durham to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

10 **WE WILL**, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Sandy Williams and Billy Durham, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

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HQM OF SPENCER COUNTY, INC.

(Employer)

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Dated _____ **By** _____
(Representative) **(Title)**

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act, It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional office set forth below: You may also obtain information from the Board's website: www.nlrb.gov.

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550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5:00 p.m.

THIS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

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THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.